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The implementation of the 1989 Television Without Frontiers Directive: television advertising and sponsorship in France, Germany, Italy, Spain and the UK.

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**THE IMPLEMENTATION OF THE 1989 TELEVISION
WITHOUT FRONTIERS DIRECTIVE: TELEVISION
ADVERTISING AND SPONSORSHIP IN FRANCE,
GERMANY, ITALY, SPAIN AND THE UK**

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A thesis submitted in partial fulfilment of the requirements of the University of
Westminster for the degree of Doctor of Philosophy

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Almudena González del Valle

PhD in Communication

The implementation of the 1989 *Television Without Frontiers* Directive: television advertising and sponsorship in France, Germany, Italy, Spain and the UK

ABSTRACT

A comparative analysis of the manner in which France, Germany, Italy, Spain and the UK have implemented the provisions in 1989 *Television Without Frontiers* Directive for television advertising and sponsorship shows that there are obstacles for the development of a Single European Market in television advertising.

Although 1989 *Television Without Frontiers* Directive allowed transfrontier television advertising, the regulation of television advertising remains nationally based. Furthermore, Member States have different levels of advertising expenditure, selling practices and television market structures.

There is a tension between the provisions for television advertising and sponsorship in the Council of Europe *Convention on Transfrontier Television* and those in the *Television Without Frontiers* Directive. Member States have indicated their commitment to one text over the other in the detailed choices for their national rules. The European Court of Justice resolved some of the contradictions and ambiguities in the 1989 *Television Without Frontiers* Directive, and these have been reflected in the revised 1997 text. But there is still an ambiguity so as to what level of sponsor presence is adequate to ensure both transparency, and the protection of a broadcaster's editorial independence.

Rules about the frequency and quantity of advertising differ between the five countries and four of them set different competitive requirements according to the type of broadcaster. There are marked differences in the rules about advertising breaks in feature films and other audiovisual works. National rules on sponsorship also vary, especially those on centre credits and the promotional mentions of the sponsor within the programme. So do the detailed provisions. National regulators decide when and what type of commercial presence constitutes surreptitious advertising. In some countries, it is only payment that renders product placement illegal, whereas in others the product has to be editorially justified and not given undue prominence.

Direct offers to the public have proved to be a grey area in Member States where their economic value was high. Teleshopping is likely to become a significant source of programming, especially if Member States effectively expand their limits on airtime as allowed in the 1997 text.

Although some differences have been resolved in the 1997 revision of the *Television Without Frontiers* Directive, there are still difficulties in establishing an effective level playing field for European television advertising.

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SECTION I

CHAPTER I

INTRODUCTION

I. 1. Advertising and European television

Advertising is an important revenue source for both all commercial and some public television systems. The amount of advertising revenue and other related activities determines the nature of the broadcast services available to European consumers. Potential new entrants to the European broadcasting arena were attracted by the prospects of large advertising revenues, as during the 1980's there was scope for advertising to grow in many countries. In the 1990's, as a result of the increase in the supply of airtime because of the deregulation of television, advertising has become a crucial source of revenue and the main way to fund the new competitive broadcasters. It has also been one way to finance new cable and satellite television services. However, as the number of channels available for advertising has increased, the competition for advertising revenue has become fierce.

According to Negrine and Papathanassopoulos, one of the key issues in television is the connection between liberalisation, advertising revenue, choice and profitability. The more competitive and liberalised the television market, the greater the advertising expenditure that will be attracted to it. The growth in advertising expenditure is closely linked to the development of new and deregulated television systems. They argue that it is this potential for growth in airtime, especially in the countries which are also in the process of liberalising their broadcasting systems, that has attracted the advertisers to the scene. The attraction

would be even stronger for those advertisers and broadcasters who would take advantage of the creation of a large European market of almost 400 million people¹.

The projected scale of expansion of broadcasting in Western Europe in the late 1980's also opened more opportunities for broadcasters and advertisers. New commercial channels depended above all on the sale of air-time to advertisers and on the sale of cheap programmes. According to Porter, the increase in airtime would increase demand because advertised goods and services would help boost consumption. Competition between broadcasters makes advertising rates considerably low, and then broadcasters would schedule programmes that are attractive to audiences. As the economic power of advertisers grows, so do their powers over scheduling and editorial policy².

The potential audience determines into which programmes advertisements are inserted or those programmes which an advertiser wants to sponsor. To the extent that advertising plays a financing role, it is likely to have an interest in the content. This raises the need to protect the editorial independence of broadcasters over their own schedules. Curran shows how the British media adapted to the marketing needs of advertisers, and shaped their content to meet the requirements of an economic system ruled by consumption and class inequalities of power³. That advertisers have shaped television has been clear from its early days. Robin Andersen affirms that sponsor-controlled programming in early days established patterns of advertising influence in the USA that have endured to the present⁴. This dynamic has always been in the structure of commercial television, but the economic changes since the 1980's have increased

¹ Negrine, R. and Papathanassopoulos, S. (1990) "The funding of programmes in the age of internationalisation", *The Internationalisation of Television*, London:Pinter, 108.

² Porter, V. (1990) "The Janus character of television broadcasting", in *The Single European Market and the Information and Communication Technologies*, Locksley, G. (ed.), London:Belhaven Press, 64.

³ Curran, J. (1986) "The impact of advertising on the British mass media", in *Media Culture and Society, a critical reader*, Collins, R., Curran, J., Garnham, N., Scannell, P., Schlesinger, Ph. and Sparks, C. (eds.), London:Sage Publications, 310.

commercial pressures. Sponsorship is also a form of relationship between advertiser and broadcaster and raises questions of the balance of control between sponsors, broadcasters and producer needs, in order to prevent a monopolisation of the airwaves by powerful vested interests⁵.

Negrine and Papathanassopoulos assert that, although cultural and geographical differences among countries seem to work against the internationalisation of television marketing, structural changes within the global economy and within the advertising industry are creating powerful pressures for it to become more international. They point out that these changes are not driven by changes in media structures, such as satellite broadcasting, but by structural changes such as the 1992 Single European Market. They argue that changes in media structures are important, but not significant enough to explain fully the changes in marketing and advertising as a whole⁶. Political and economic changes in Europe have altered the trading environment in which advertisers operate. Dibb, Simkin and Yuen assert that, as the advertising industry attempted to get to grips with legislative and media changes, advertising agencies worked hard at creating alliances and developing networks that would help them enter the new European consumers. Negrine and Papathanassopoulos estimate that the process of conglomeration of advertising businesses will make it easier to internationalise products and marketing, but these changes have to coincide with centralised decision-making within a multinational, a common product strategy and common advertising regulations across countries⁷.

Television advertising in the European Union (EU) grew enormously and faster than average consumer expenditure in the 1980's, probably because of the rising structural demand for the

⁴ Andersen, R. (1995) *Consumer, Culture and Television Programming*, Colorado:Westview Press, 4.

⁵ Ford, B. and J. (1993) *Television and Sponsorship*, Oxford:Butterworths-Heinemann Press Ltd., 4.

⁶ Negrine, R. and Papathanassopoulos, S. (1990) "The funding of programmes in the age of internationalisation", *The Internationalisation of Television*, London:Pinter, 121.

medium. Advertising markets across EU countries vary enormously in their stages of development. Among EU Member States the practices of selling and buying advertising on television are very different. For example, in France, Italy and Spain, discounts are common and media buyers are the main buyers of advertising airspace. On the offer side, television services in Italy and Spain usually talk directly to advertisers, whereas in countries like Germany or the UK, advertising agencies are the main intermediary. The dialogue between advertisers and television channels in Italy and Spain is fluid and direct, in order to save fees and commissions. In Germany and the UK, the dialogue between advertisers and television services is usually mediated through the advertising agencies.

European advertising markets are also of different sizes. So is the weight of that market within the economy of each particular EU Member State. Although France, Germany, Italy, Spain and the UK have the biggest advertising markets in the EU, their growth is at different levels. So are their television industries: Spain and Italy hardly have any satellite television and practically no cable television distribution, whereas Germany, the UK, and France are to some extent reasonably cabled and satellite reaches a substantial part of the population. These differences affect national policy objectives, but also affect the potential development of pan-European television. Porter argues that broadcasting policy is shaped by the control which countries exert over the sale of airtime⁸. Silj affirmed in 1992 that, in fact, “the European market in broadcasting is merely a collection of distinct domestic markets and will probably remain as such with the exception of a few satellite channels aimed at niche audiences”⁹. Pan-European audiences are also difficult to estimate. Mattelart identified the need for clear international audience research in order for pan-European advertising to work.

⁷ *ibid.*, 122.

⁸ Porter, V. (1990) *op. cit.*, 64.

⁹ Silj, A. (1992) “Domestic markets and the European market”, *The New Television in Europe*, London:Libbey, 16.

Media buyers and advertising agencies must provide advertisers with clear information in order to direct their investment in television more efficiently¹⁰.

According to Siliato, the analysis of bargaining or deals between sellers and buyers wanting successful bids for their business, explains most of the similarities and differences within European advertising markets. He showed that in 1992 sixty five per cent of advertising space sold in the EU is negotiated. In Italy and France bargaining was so powerful that it had a decisive effect on planning itself, and foreign buyers, unfamiliar with the mechanisms, could pay more than their local competitors for advertising space. Discounts in the UK are around ten per cent. Germany generally does not bargain over list prices, but some signs of bargaining had started to appear in small media and among private broadcasters¹¹. Siliato argued that those differences are probably one of the results of cultural differences between “northern” and “southern” Europe, but he maintains that bargaining will dominate the advertising market. The situation has changed enormously since 1992, when Siliato was writing. For example, discount in Spanish media is now high and France has introduced a law regulating the relationships between media buyers, advertising agencies and the media¹². However, the rules of the free market would impose bargaining, because without it flexibility between supply and demand is lost. The rules of the game, that is the method of bargaining, should be known to all countries in order that they can participate in it. In fact, he argues, that is what advertisers would need to know in order to operate on a pan-European basis.

Although the media in Europe are adopting increasingly uniform standards across borders the truth is that pan-advertising in Europe hardly exists. Some media have begun to offer pan-

¹⁰ Mattelart, A. (1991) *Advertising International, the Privatization of Public Space*, London:Routledge, 144.

¹¹ Siliato, A. (1992) “The European advertising markets: Comparisons and analysis”, in *The New Television in Europe*, Silj, A. (ed.), London:Libbey, 144.

¹² Law 93-122 of 29 January 1993 on the prevention of corruption and on the transparency of economic life and public procedures, JO of 30 January 1993, *Loi Sapin*.

European or multinational media packages, with bulk discounts across borders. However, what constitutes advertising in one territory is not necessarily the same in another. Budget, cultural and legal requirements differ enormously, and different cultures demand separate features and programming reflecting national tastes. Dyson and Humphreys identified the problems for cross-national broadcasting as being created by language barriers, the escalation of programme costs, the question of the availability of sufficient advertising revenue to support so many channels, and the continuing losses by new channel operators. They pointed out that, at the beginning of 1989, the available satellite television channels in Europe reached only sixteen per cent of the viewers they could technically reach, and their share of the total audience was less than two per cent in total¹³. In advertising, the choice between targeting a localised audience or adopting a standardised strategy is constrained by the cultural, social, demographic and political make-up of the market. Dibb, Simkin and Yuen suggest that perhaps a fundamental problem is the varied legislation and regulation which applies within the EU¹⁴. This viewpoint is shared by Negrine and Papathanassopoulos. Although advertising on European television had become the norm from the 1950's, there were restrictions and obstacles. In addition to the low level of commercial airtime available before the early 1990's, there were restrictions on sponsorship, on certain product categories, and limitations on the amount and frequency of advertisements. According to the authors, such restrictions made difficult the growth of advertising revenue in Europe and by extension, the growth of a Single Market. One could argue that most of the old constraints for television advertising, for example, little commercial airtime available, are no longer present and although the advertising market has expanded, there remain problems for the growth of a Single Market.

¹³ Dyson, K. and Humphreys, P. (1990) *The Political Economy of Communications, International and European Dimensions*, London:Routledge, 15.

¹⁴ Dibb, S., Simkin, L. and Yuen, R. (1994) "Pan-European Advertising: Think Europe, Act Local", *International Journal of Advertising*, N°13, 125-136.

The drive towards pluralism in broadcasting arises from the belief that more opportunities to enter a market lead to a greater supply of broadcast services, as well as to diversity in the programmes offered. The first result of competition in broadcasting is the loss of audience share to new entrants by the existing monopolies. The usual solution is to change programming to attract more viewers. This often means that more attention is given to programme scheduling and to developing "commercial programmes"¹⁵. This is usually tied up to notions of a loss of quality, something which is open to discussion. Wright studied the relationship between television advertising regulation and programme quality. He concluded that the effect of regulating the amount of advertisements per unit of time on viewer welfare is ambiguous. On the other hand, policies fostering competition will not necessarily increase viewer welfare because their effect on programme quality is also not clear¹⁶. But the preservation of programme quality remains at the base of many of the media and advertising policy debates.

Wheatherill affirms that the irresistible internationalisation of commerce is a major factor in the decline of national markets. The process, he argues, is a major factor in the decline of the independent state's ability to make and apply its own laws. For example, the maintaining of national morality standards is seriously undermined if citizens are able to watch programmes or advertisements on television channels which have no direct link to the state regulating the broadcast of offensive material. The broadcaster might previously have been based in the regulating state but may have chosen to move abroad to take advantage of a more favourable regulation regime. This mobility diminishes a state's capacity to define itself by setting its own rules¹⁷.

¹⁵ Hultén, O. and Brants, K. (1992) "Public service broadcasting: Reactions to competition", in *Dynamics of Media Politics*, Siune and Truetzschler (eds.), Euromedia Research Group, London:Sage, 122.

¹⁶ Wright, D. (1994) "Television advertising regulation and programme quality", *The Economic Record*, Vol. 70, N°211, December, 361-367.

Such views justify regulation at the international level, and in the 1980's fears that satellite television would bring an increased loss of control over harmful advertising coming from a different Member State were vividly present in media policy debates. Some of the concerns were commercial, namely that direct satellite television channels from one country would "siphon off advertising money from another country, thereby eroding the media structure of the latter country"¹⁸. Schiller had feared that the increasing involvement of advertisers in commercial television, which responds to the wants of advertisers and advertising agencies to penetrate effectively markets through the communications media, would undermine the "most stable non-commercial broadcasting structures of sovereign (Western European) states"¹⁹. But if one accepts that transnational advertising helps increase international commerce, then facilitating transnational advertising would ease trade across the EU.

Advertisements can cross national boundaries, and even if they are still compressed and controlled into special slots of broadcasting time, the programmes themselves often follow the direct or indirect dictates of their sponsors²⁰. Porter states that at the policy making level, the attempts to limit the economic power of advertisers are not just economic and cultural, but also political. An increase in the power of advertisers to shape broadcasting policy could threaten the political fabric of a nation itself, because broadcasters would be accountable to advertisers²¹. The potential European audience was regarded as a vast consumer market for products and for advertisers. Wenger feared that Europe would "sink to the level of a flashy subsidiary of the supermarket of the international image"²². The expansion of the television

¹⁷ Weatherill, S. (1995) *Law and Integration in the European Union*, Clarendon Law Series, Oxford:Clarendon Press, 2.

¹⁸ Hondius, F. W. (1985) "Policy Issues in Television Advertising in Europe", *Transnational Data Report*, Vol. VII, N°7, 409.

¹⁹ Schiller, H. I. (1971) "The international commercialisation of broadcasting", *Mass Communications and American Empire*, Boston:Beacon Press, 99.

²⁰ *ibid.*, 98.

²¹ Porter, V. (1990) *op. cit.*, 64.

²² Wenger, K. (1988) "European television- Pandora's box?", *EBU Review, Programmes, Administration, Law*, Vol. XXXIX, N°5, September, 26.

advertising market would be able to finance the growing need for programmes, and therefore, advertising would account for the erosion of schedules. Wenger proposed that only a balance in regulatory objectives would harmonise the constraints of economic policy and technological advances with the cultural and political objectives.

Barendt emphasised the role played by advertising considerations in shaping European regulation. Advertising agents want to communicate their messages freely across national boundaries, in order to attract the attention of viewers in a number of countries. This is difficult when states prohibit the retransmission of commercials which violate their own advertising codes, regardless of their compliance with the requirements of the transmitting state. For Barendt, the answer is to provide for the free reception and retransmission of broadcasts which satisfy the advertising rules of the state where they originate²³. Mattelart and Palmer identified the role of advertising agencies and advertisers' associations in confronting regulatory threats from the various European fora where the future of European broadcasting was in debate in the 1980's. Advertising interests formed or revived their trade associations and were consulted wherever policy discussions were taken with regard to the future of international television. Advertisers favoured a self-regulatory regime to prevent state intervention. The professional guidelines of the advertising industry were based on the belief that it should itself police the market, developing proper codes of practice²⁴. In the 1980's, developments in cable and satellite distribution raised questions about transfrontier communication in Europe which would affect the different national historical traditions, political structures, cultural attitudes and behaviour. In the light of the structural changes in the television and advertising fields, advertising and media interests have helped internationalise the broadcasting policy sectors of Europe. Until the 1980's, regulation of the European mass media had been at the national level, and "regulations governing programmes and their providers -including rules for advertising- were entirely

²³ Barendt, E. (1993) *Broadcasting Law*, Oxford:Clarendon Press, 190.

determined by statutes and codes of conduct at the national level”²⁵. The main policy actors were national ones, and national lobbying groups were organised to influence national mass media policies.

The question of limiting advertiser presence within the European television programmes while at the same time developing a competitive industry necessarily meant conflicting points of view between the media, advertisers and regulators. The conflicting interests at both European and national levels raise questions of the suitability of one forum over the other for the discussion.

1. 2. The European Union as an actor

Primary legislation in Community Law are the several Treaties: The Treaty of Paris, signed by France, Germany, Italy, Belgium, the Netherlands and Luxembourg in 1951 creating the European Coal and Steel Community (ECSC), with the objective of a common market in the production of coal and steel; and the Treaty of Rome in 1957 creating the European Economic Community (EEC) and the European Atomic Energy Authority (Euratom)²⁶. From the beginning, the EEC Treaty was intended to evolve towards an “ever closer union among the peoples of Europe”²⁷. Amendments were introduced by the Single European Act (SEA), signed in 1986.²⁸ The SEA formally initiated the search for a European Union (EU). The Council of Ministers was recognised as the supreme over-arching body. The SEA reformed the decision-making processes of the founding Treaties; voting arrangements in the Council of Ministers; the

²⁴ Mattelart, A. and Palmer, M. (1991) “Advertising in Europe: Promises, Pressures and Pitfalls”, *Media, Culture and Society*, Vol. 13, N°4, October, 536.

²⁵ Humphreys, P. (1996) *op. cit.*, 256.

²⁶ Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951; Treaty establishing the European Atomic Energy Community and the European Community, Rome, 25 March 1957.

²⁷ Preamble of the EEC Treaty, Treaty of Rome, 25 March 1957.

²⁸ Single European Act, Luxembourg, 17 February 1986, and The Hague, 28 February 1986.

legislative relationship between the Council and the European Parliament, and an additional court, the Court of First Instance, was granted to the Court of Justice. The SEA declared that the Community should aim at completion of the Internal Market by 31 December 1992. Finally, the Maastricht Treaty, or Treaty of the European Union, signed in December 1991 by the Member States, twelve at the time: the six founder States and Denmark, Greece, Ireland, Portugal, Spain and the UK, which had joined at various stages over the years²⁹. The Maastricht Treaty provides for both economic and political unions, but the UK and Denmark opted out of the third stage of European Monetary Union in a Protocol of the Treaty. A significant feature of the Maastricht Treaty is the principle of subsidiarity, which provides for devolved decision-making in areas outside the exclusive competence of the EU. The Community will only regulate those activities where it can operate more efficiently than single Member States.

Community legislation has to be incorporated into the national law. The impact of Community Law upon the laws of Member States depends on two principles: the direct applicability and the supremacy of Community Law³⁰. Under the Treaty of Rome, the principle of supremacy means that Community Law takes precedence over national law. It is closely bound to the principle of direct effect. As defined by Kent, “directly applicable Community Law means those provisions which take effect in the legal systems of the Member States without the need for further enactment. Directly effective Community Law means those provisions which give rise to rights or obligations on which individuals rely before their national courts”³¹.

The Treaties distinguish between different types of legislation: Regulations, Directives, Decisions, and Recommendations and Opinions³². Under Article 189 of the Treaty of Rome, Regulations, are entirely binding and directly applicable in all Member States. Thus, they take

²⁹ Treaty of the European Union, Maastricht, 7 February 1992.

³⁰ Lasok, D. (1994) *Law and Institutions of the European Union*, sixth edition, London:Butterworths, 294.

³¹ Kent, P. (1996) *Law of the European Union*, second edition, London:M&E Pitman, 52.

effect without further enactment. Most Regulations are adopted by the Commission and concerned with technical adjustments to existing Community Law. A Decision is binding in its entirety upon those to whom it is addressed³³. Many Decisions are highly specific, and are administrative rather than legislative acts. Indirectly applicable provisions in Community Law such as Directives have to be implemented by state legislation. Directives are binding as to the result to be achieved, but the choice of their legal form and their methods of implementation are left to the national authorities. They have to be enacted by the Member States to become part of their law, but Member States have considerable discretion in the choice of methods³⁴. Recommendations and Opinions have no binding force, and so they are not strictly Community Law. The Court of Justice has on occasions referred to them, so their status is only advisory.

The adopted laws constitute secondary legislation. They are concerned with translating the general principles of the Treaties into specific rules adopted by the Council, by the European Parliament or by the Commission. The Council of Ministers is the decision-making body. It adopts legislation on the basis of proposals presented by the Commission, and after the Maastricht Treaty, under the co-decision procedure it decides with the European Parliament. The Council can agree on a proposal by unanimity, simple majority or qualified majority. For a measure to be adopted by qualified majority, as in the case of most of the Single Market proposals, for example, fifty four votes are needed or, in other words, twenty three votes against it will block the proposal. The Minutes of the Council of Ministers' sessions are not freely available to the public, and are not always disclosed³⁵.

There have been four legislative procedures: consultation, co-operation, co-decision and assent procedures. Under the last three, qualified majority voting rules apply in the Council of

³² Article 14, European Coal and Steel Community; Article 189, EEC Treaty, Article 161, Euratom.

³³ Article 189, EEC Treaty.

³⁴ Lasok, D. (1994) *op. cit.*, 300.

Ministers when voting on proposals under certain Articles of the Treaty. A qualified majority can overcome the blocks that negative votes by certain Member States would create in the decision process. The SEA created the co-operation decision procedure. The main reason for this procedure was to increase the efficiency, and speed, of the decision-making process. Ten EEC Treaty Articles were made subject to this procedure, in respect of the Single European Market (SEM) programme. The co-operation procedure also gave more powers to the European Parliament by introducing a Second Reading. Under the Maastricht Treaty, however, most SEM legislation has been transferred to the co-decision procedure, and gives to the European Parliament the right to veto proposals which are subject to that procedure.

The European Court of Justice (ECJ) has developed a jurisprudence on the incorporation of general principles of law. It has filled the gaps left by the Treaties and secondary legislation. It interprets Community Law, primary and secondary legislation and national implementation of secondary legislation. States and individuals can appeal to the ECJ to challenge Community action under certain articles or to challenge the action of Member States which it arises from a right of duty under Community Law³⁶.

Directives only come into force when appropriate national measures are taken by the Member States to which they are addressed. As a consequence they tend to be more concerned with laying down policy principles that the Member States must seek to achieve, and not so much with the detail of the application. Member States seek to enact these principles by the appropriate means under their respective national constitutional and legal systems. Each Member State determines which are the appropriate authorities, and by what process provisions are to be incorporated. In most cases the Member States have merely to adapt their existing laws to the overall strategy of the particular Directive. These can vary from administrative

³⁵ Nugent, N. (1994) *The Government and Politics of the European Union*, third edition, London:Macmillan, 211.

actions to new laws approved by national legislatures. As a result, the mechanisms vary according to both differing national legislative procedures and perceptions of how important particular Directives are judged to be³⁷. Because of this difference in the modes of application, the flexibility in incorporating the provisions of Directives also varies between Member States. Allen, Llewellyn and Swann stated that the objective of European Directives would not happen until the rules have been implemented by the Member States. But implementation will not be enough, they argue. Member States will have to fully act in the spirit of Directives. There is in fact, an enforcement problem³⁸. Most Directives have been issued to harmonise national law in the Community, but they give a deadline, usually one to two years after the date of the adoption of the Directive, by which time Member States must have implemented it³⁹.

The policies that lie at the heart of the EU are aimed at creating the Internal Market, or Single European Market (SEM). They enable the EU to act as a common front against third countries. The SEM is founded on several principles. The first is the guarantee of free movement of goods, persons, services and capital between Member States. The second is the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market, stated in Article 100 of the Treaty of Rome. Prior to the Maastricht Treaty the article included the harmonisation of such legal provisions⁴⁰. A third pillar of the Single Market is competition policy, or the prevention or distortion of competition within the internal market, described in Articles 85 to 94 of the EC Treaty. According to the European Commission, the programme has resulted in major advances in dismantling barriers. Proper enforcement of the Single Market rules ensuring that the full

³⁶ *ibid.*, 30.

³⁷ Nugent, N. (1994) *op. cit.*, 326.

³⁸ Allen, D., Llewellyn, D. and Swann, D. (1993) "A forward view" in *The Single Market and Beyond, a Study of the Wider Implications of the Single European Act*, Swann, D. (ed.), London:Routledge, 253.

³⁹ Singleton, S.E. (1996) "Legislative Acts", in *Butterworths Expert Guide to the European Union*, Monar, J., Neuwall, N., O'Keeffe, D. and Robinson, W. (eds.), London:Butterworths, 217.

⁴⁰ *ibid.*, 275.

benefits are delivered is a top priority of the Commission⁴¹. The strategy for the completion of the Single Market was set out by the European Commission in 1985 and was then endorsed by the Member States. But although harmonisation was a main requirement, it was not always needed. Where rules are not harmonised at Community level, Member States must recognise each other's national rules and regulations, the principle of mutual recognition.

However, harmonisation and mutual recognition do not by themselves ensure that the freedoms guaranteed in the Single Market are realised. The Commission acknowledges that ninety two per cent of Directives have been implemented since 1985, but progress has been slow, and there are areas where the necessary legislation has not yet been implemented⁴². According to Lasok, the state of the application of Community Law into national legislation reveals slow progress. Parliaments, he notes, are not willing to act and their procedures are lengthy and cumbersome. As guardians of national sovereignty they seem to resent the intrusion of other law-making authorities although they have accepted the Treaties. The tendency is to leave application in the hands of the Executive⁴³.

Since the mid-eighties, the SEM project has produced an increase of these market-based policies. According to Nugent, this is somewhat ironic, since the idea of the SEM was to liberalise and de-regulate the functioning of the market⁴⁴. The SEM programme boosted sector policies, of which broadcasting is one example.

Other related policies are geared to consumer protection. Recommended legislative action in this area aims to solve problems in the health and safety field, in economic interest and in the

⁴¹ "The European Union's Single Market", in <http://europa.eu.int/pol/singl/en/info.htm>, 14 January 1998.

⁴² *ibid.*; the areas mentioned are utilities and the open and competitive procurement of goods and services by public authorities.

⁴³ Lasok, D. (1994) *op.cit.*, 302.

⁴⁴ *ibid.*, 55.

co-ordination of consumer protection with other Community policies. Several legislative acts were passed under this particular field of Community policy affecting advertising, foodstuffs and labelling. In connection with the protection of minors, the Community is most concerned with toy safety and advertising directed at children. In the field of tobacco and alcohol advertising directed at children in all Member States specific regulations apply. With regard to other products or services of interest to children, such as sweets, confectionery and toys, national regulations are not at all uniform. The various regulatory initiatives at the European level do not properly cover the cross-border dimension of advertising to children, it is therefore difficult for individual Member States to enforce national regulation in the case of “foreign” advertisers violating these⁴⁵.

In the context of the Single Market and commercial communications, the Committee on the Environment, Public Health and Consumer Protection of the European Parliament stated that the increasing cross-border transactions required a balance between the free flow of information and consumer protection. Consumers should be confronted with a maximum degree of harmonisation in the field of advertising, and concluded that national provisions for consumer protection, which establish consumer rights or promote consumer interests must not be challenged as barriers to the Single Market⁴⁶. Under the Maastricht Treaty the focus has shifted from minimum standards and mutual recognition, as in the SEA, to the principle of subsidiarity. This principle will be determinant in those cases where a matter could be better regulated at the national level. The measure, however, has to be proportionate to the objective pursued.

⁴⁵ “Commercial Communications to children”, in *Commercial Communications*, Issue 7, June 1997, 13.

⁴⁶ “The report of the Environment Committee”, *ibid.*, 18.

I. 3. European regulation of television advertising

According to Barendt, questions about the legitimacy of advertising regulation respond to the pursued objective. The issue is whether the control is intended to prevent a type of advertising message to protect the public, or it is intended to limit the amount and frequency of advertisements to protect the integrity of the programmes, in the interest of viewers. Regulatory measures may be intended to preserve the survival of other media. He argues that for example, content-based prohibitions on tobacco or alcohol advertising must be justified as serving the public interest, public health in this case⁴⁷. When the aim is to limit advertising as revenue, arguments are found on the grounds of both freedom of expression or even freedom of economic initiative. Italy's Constitutional Court, for example, refused to extend the freedom of expression to promotional advertising, but affirmed instead that this type of advertising is an aspect of economic activity that can be regulated in the public interest⁴⁸.

Advertising is covered by the principle of freedom of expression. According to Voorhoof, Article 10 of the European Convention of Human Rights is the fundamental basis for mass media policy and mass media law⁴⁹. It states that:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure

⁴⁷ Barendt, E. (1993) *op. cit.*, 193.

⁴⁸ *ibid.*, 194.

⁴⁹ Voorhoof, D. (1993) “Restrictions on Television Advertising and Article 10 of the European Convention on Human Rights”, *International Journal of Advertising*, Vol. 12, N°3, 191.

of information received in confidence or for maintaining the authority and impartiality of the judiciary.”⁵⁰

In a dispute which considered whether that right extends to include a right to free commercial expression, the European Court of Human Rights considered in *Casado Coca v Spain* that Article 10 does not apply solely to certain types of information, or ideas, or forms of expression, but that “the guarantee in Article 10 extends to everyone regardless of whether their aim is commercial or not”⁵¹. Although it applies “in particular (to) those of a political nature; it also encompasses artistic expression, information of a commercial nature (...) and even light music and commercials transmitted by cable”⁵².

The interpretation of Article 10 of the ECHR affects the position of the advertising community. The European restrictions on advertisements for tobacco products and medicines available on prescription, or rules on alcohol advertising, are only justifiable under article 10(2) ECHR which bases the restriction of the freedom of expression for the protection of health or morals.

Advertising also benefited from the principle of free circulation of services in the Treaty of Rome. The European Commission has to ensure that national regulatory differences cannot become potential barriers to the free movement of goods and services throughout the EU. The TWF Directive expresses it thus:

“Whereas the Treaty provides for the establishment of a common market, including the abolition, as between member states, of obstacles to freedom of movement for goods and services and the institution of a system ensuring that competition in the common market is not distorted”⁵³.

⁵⁰ Article 10, European Convention for the Protection of Human Rights and Fundamental Freedoms, in *Transfrontier TV in Europe: The Human Rights Dimension*, Cassese, A. and Clapham, A., (eds.) Baden-Baden: Nomos Verlag, Annex 1, 261.

⁵¹ European Court of Human Rights, Judgement of 24 February 1995 in *Casado Coca v. Spain*, July 1994 (1) ECHR 1-27.

⁵² *ibid.*

⁵³ Council Directive 89/552/EEC of 3 October 1989, OJ 298 L of 17 October 1989.

The importance of advertising in the European broadcasting context is highlighted by the enactment of Council Directive 89/552/EEC of 3 October 1989 (TWF Directive) and by the agreement of the Council of Europe *Convention on Transfrontier Television* (CoE Convention)⁵⁴. Some cultural concerns were nevertheless present at the beginning of European regulatory interest in broadcasting. The Council of Europe acknowledged that developments in broadcasting could open opportunities for more choice to the European public as well as provide new opportunities for cultural expression, international communication and contacts between nations. There was, however, an implicit challenge, that of the safeguard and maintenance of European cultural identities⁵⁵.

One of the reasons to act quickly on media policy at the European level was to safeguard the Member States' sovereignty while at the same time setting down conditions for a level playing field where television could develop within the framework of the Single European Market. Advertising was a field which had to be harmonised or levelled to enable this common television market.

That broadcasting came under the scope of Community policy initiatives in the 1980's is not surprising. The internationalisation of television in terms of its process of production, its potential to be commercialised and its distribution attracted the attention of the European regulators. Advertising as a source of financing television channels is "framed" by EU guidelines which are the result of political and economic compromises by the Member States. Locksley states that the attraction responded mainly to the influence that these developments exert in trade between Member States⁵⁶. He argues that, as an economic activity, the audio-visual sector is subject to the application of competition laws. This factor can be regarded as

⁵⁴ *ibid.*; Council of Europe (1989) *Convention on Transfrontier Television*, Strasbourg, 5 May 1989.

⁵⁵ Council of Europe (1989) *Explanatory report to the European Convention on Transfrontier Television*, Recital 24, Strasbourg, 5 May 1989.

consistent with the aim of completing the internal market⁵⁷. Martín argues that although it is evident that television has a strong socio-cultural, political and educational character, the fact that advertising is a source of finance makes television an economic phenomenon⁵⁸. The discussion lies at the heart of Community regulation of television. Advertising, being a main source of income for the audio-visual sector in Europe would come under this debate. But advertising also had to comply with standards and rules that would protect the viewer, protect minors from its influence, and protect the editorial independence of broadcasters. Therefore, the European regulation of television advertising is framed within the economics of television, and within the social objectives of public interest.

The debate around the Commission's powers to regulate television was narrowly focused because the Treaty of Rome did not mention cultural matters. The discussion has been somehow closed in the new Maastricht Treaty. Article G(37) of the Maastricht Treaty inserts a new Article 128 in the Treaty of Rome. It states that the Community shall contribute to "the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore"⁵⁹. Paragraph 2 encourages co-operation between Member States in certain areas, including the audio-visual sector. In 1989, when the completion of the Single European Market was in view, the principle of the free circulation of products and services in the Member States was behind economic integration. It was envisaged that economic integration would help develop cultural and eventually political integration. It is questionable whether television can be a tool for integration. According to Papathanassopoulos, transfrontier television confirms the paradox. He cites it as an example of an area of affairs where many apparently sovereign decisions by the

⁵⁶ Locksley, G. (1992) "The new television and the European regulatory authorities", in *The New Television in Europe*, Silj, A., (ed.), London:Libbey, 127.

⁵⁷ Locksley, G. (1992) *op. cit.*, 128.

⁵⁸ Martín, J. (1995) *La Directiva de televisión*, Madrid:Colex, 57.

⁵⁹ Treaty of the European Union, Article G(37) inserting Title IX, "Culture", Article 128 of the EC Treaty (as amended).

Member States are constrained by the decisions of others, as well as by technological and economic interests⁶⁰. One could argue that the decisions taken by others are constrained by the agreement of minimum standards and the mutual recognition embedded in the TWF Directive.

At the European level, interest in regulating broadcasting started in 1982 with the Hahn Report and the Hahn Resolution, which advocated the establishment of a European television channel⁶¹. It judged that integration was unlikely to happen if media were controlled at the national level. It also set the Commission's views of broadcasting policy as a way of establishing a Single European Market, a "television without frontiers"⁶². The Commission asserted that since transfrontier television did not respect frontiers, it had a political and moral right to act because broadcasting was relevant to European integration.

In the view of the European Commission the principle of free movement of goods and services applied to television, and to television advertising. According to Humphreys, it was not necessary to apply Article 59 of the Treaty of Rome while broadcasting in Europe remained mainly public broadcasting⁶³. Article 59 provides that in order to promote the free exchange of goods and services among Member States:

“ (...) restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended”⁶⁴.

⁶⁰ Papathanassopoulos, S. (1990) "Broadcasting and the European Community: the Commission's audio-visual policy", in *The Political Economy of Communications, International and European Dimensions*, Dyson, K. and Humphreys, P. (eds.), London:Routledge, 115.

⁶¹ European Parliament (1982) Report on Radio and Television Broadcasting in the European Community on Behalf of the Committee on Youth, Culture, Education, Information and Sport, (The Hahn Report); European Parliament (1982) Resolution on radio and television broadcasting in the European Community (The Hahn Resolution).

⁶² Collins, R. (1994) "Unity in Diversity? The European Single Market in Broadcasting and the Audio-visual, 1982-92", *Journal of Common Market Studies*, March 1994, Vol. 332, N°1, 94.

⁶³ Humphreys, P. (1996) op. cit., 262.

⁶⁴ Article 59, EEC Treaty.

However, there was already a growing body of jurisprudence at the European Court of Justice (ECJ). In the 1974 *Sacchi* judgement, the ECJ ruled that broadcasting was covered by the Treaty and that discrimination on the grounds of national origins of a broadcasting service, was unlawful⁶⁵. Broadcasting was a service not a product. This case meant that a cable operator in Italy could not be prevented from re-distributing television signals even though the signals originated from outside Italy and Italian law granted a monopoly to RAI.

The ECJ ruled in *Debauve* that cable television and terrestrial television should be given the same treatment and confirmed that the discrimination on the grounds of national origin of programmes or advertisements was unlawful, as seen in the *Sacchi* case⁶⁶. In short, the ECJ admitted in the *Debauve* ruling that restrictions to the free flow of broadcasting that apply to both foreign and national services, were authorised in the absence of harmonisation, if justified by reasons of general interest. Another reason to stop the free flow of broadcasting services was the protection of intellectual property, as set down by the ECJ in the *Coditel* ruling. This judgement found that it was lawful for holders of intellectual property rights in one jurisdiction to restrict cross-border circulation of goods and services in which they held rights. This constituted a major obstacle for the Single Market in television. Because the ECJ ruled against the Commission, the latter proposed a system of compulsory licensing.

With these two cases, the ECJ was inviting the Commission to propose harmonisation only in those fields where the national legal differences allowed Member States to stop the free flow of programmes on the grounds of the general interest. These fields were advertising, sponsorship, the protection of minors and right of reply⁶⁷.

⁶⁵ ECJ, Judgement of 30 April 1974 in Case 155-73, *Giuseppe Sacchi*, 1974 ECR 409-433.

⁶⁶ ECJ, Judgement of 18 March 1980 in Case 52-79, *Procureur du Roi v Debauve*, 1980 ECR 883; ECJ, Judgement of 18 March 1980 in Case 62-79 *Coditel*, 1980 ECR 881.

⁶⁷ Schwartz, I. (1990), “*La liberté d’expression (Art. 10 CEDH) et la libre prestation des services (Art. 59 Traité CEE) dans le domaine de la radiodiffusion télévisuelle*”, in *Transfrontier Television in*

Both the TWF Directive and national regulation play a part in determining just how much advertising expenditure television stations are able to attract to finance their programming needs. The 1989 TWF Directive was adopted under the co-operation procedure and establishes the minimum requirements for both the content and amount of advertising on television in the EU⁶⁸. It had to be implemented into the national legal systems. The TWF Directive was revised in June 1997, and adopted this time under the co-decision procedure⁶⁹. In the case of the 1989 TWF Directive, the provisions regarding advertising and sponsorship have been incorporated into the national legal systems in various ways. They range from administrative codes of practice in the UK, to new laws in France, Spain and Italy, and their interpreting decrees and decree-laws. Germany has Inter-Land Agreements to provide a common framework of rules across *Länder*. States were given a date by which to bring the TWF Directive into effect, and are obliged to notify the Commission of the national legislation, regulations, or administrative action they have adopted. However, because of the principle of supremacy, in the period when a Directive has not yet been implemented by the national legislators, Community Law takes precedence, so the Directive would be binding. This was the case in Spain, which did not implement the 1989 TWF Directive until July 1994, three years later than the required date of 3 October 1991. In the meantime, the TWF Directive effectively provided Spanish television with a more friendly regulatory framework for the incipient deregulated market.

The 1989 text dealt with advertising on television as a source of finance. The 1989 TWF Directive establishes the basis for the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting

Europe: The Human Rights Dimension, Cassese, A. and Clapham, A. (eds.), Baden-Baden:Nomos Verlag, 169.

⁶⁸ Council Directive 89/552/EEC of 3 October 1989.

activities. It set out three types of financial arrangements between advertising interests and television broadcasters: Television advertising, programme sponsorship and surreptitious advertising, and indirectly, it referred to direct offers to the public. It also included a chapter on advertising and sponsorship laying down provisions for the co-ordination of national rules on their content and scheduling. According to Wagner, at the time of the adoption of the 1989 TWF Directive, national attitudes to market liberalisation differed widely between Member States. The German *Länder*, for example, were sensitive to threats to their sovereignty over broadcasting issues; Britain and Germany were enthusiastic about market liberalisation, France and Italy were in favour of a European market but only a protected one, and Spain was apparently not very interested⁷⁰. Spain had only joined the Community in 1986, and deregulation in broadcasting was not a significant issue until 1989. In any event, only Italy and the UK had well developed commercial television systems. Italy and France sought protection for their television and audio-visual industries. They all approached the debate with different experiences. The result was a text which was regarded as a compromise. The issue for analysis is whether this text has effectively made a difference for the construction of an “ever closer union” in television advertising.

The Commission’s goals were to ensure that any Community broadcasting enterprise would be given access to any Community national television market for its signal. A single broadcasting market would serve political and cultural goals. Dehousse argued that the conflict between the two objectives, market integration and regulatory objectives, could only be reconciled at the European level. The focus on market integration leading to lower regulatory protection, coincides with the fear by Member States of an over-regulation imposed by Brussels⁷¹. The free

⁶⁹ European Parliament and Council Directive 97/36/EC of 30 June 1997 amending Council Directive 89/552/EEC, OJ L 202 of 30 July 1997.

⁷⁰ Humphreys, P. (1996) *Mass Media and Media Policy in Western Europe*, Manchester:Manchester University Press, 270.

⁷¹ Dehousse, R. (1992) “Integration v. Regulation? On the dynamics of regulation in the European Community”, *Journal of Common Market Studies*, Vol. XXX, N°4, December, 383.

flow of products and services would affect both the audio-visual industry and the advertising industry. Advertisers would be able to advertise their products across all the Member States in which those products were sold. According to Locksley, “1992 and television without frontiers means advertising without frontiers”⁷². The free movement of goods and services, necessarily requires the free movement of advertising⁷³. However, the Single European Market in advertising has proved to be difficult to achieve, and regulatory barriers which had been identified in 1984 are still in place. Dibb, Simkin and Yuen complain that in 1994, despite the promised harmonisation of regulations across Member States, advertising still faced sets of laws and regulation which vary significantly from country to country⁷⁴. Despite the efforts to achieve European integration, advertising law in the European Community remains principally national, as EU institutions have preferred to allow the Member States to regulate advertising in their own ways, rather than to have the EU regulate advertising itself⁷⁵.

Regulatory authorities in charge of implementing the TWF Directive’s provisions are also very diverse. Some Member States have delegated the regulation of audio-visual matters to administrative authorities like the UK. Others like Spain, not. The diversity in legal traditions also makes implementation difficult. One of the basis for co-operation at the European level is the control that these national regulators exert locally⁷⁶. De Salas points out the importance of self-regulation in exerting this control at a pan-European level. He questions the need to

⁷² Locksley (1989) “Television business in Europe: The Big Picture”, in *The European Experience*, Nowell-Smith, G. (ed.), London:BFI, 13.

⁷³ Pullen, M. (1996) “TV Advertising within the EU and EEA”, *Entertainment and Law Review*, Comment section, Vol. 7, Issue 1, January-February, 35-39.

⁷⁴ Dibb, Simkin and Yuen (1994), op.cit., 126.

⁷⁵ Dehousse, R. (1992) op. cit., 391.

⁷⁶ Robillard, S. (1995) “Les autorités de régulation”, *Media Pouvoirs, Dossier Spécial 50 ans*, N°39-40, 117.

establish a pan-European regulatory authority which would assume the control and regulation tasks and could become the arbitration and mediation body in transfrontier issues⁷⁷.

This research examines several issues raised by the different interpretations of the 1989 TWF Directive by five Member States: France, Germany, Italy, Spain and the UK. The study examines the interpretations of the 1989 TWF Directive's provisions for advertising, which were put into place within the existing legal frameworks. In some countries, such as the UK, the regulation was detailed and strict. In others, like Italy it was very primitive. Germany and Spain have legislative bodies with powers at both the national and regional levels. Each country in this study also has strong structural differences, which make the comparative analysis interesting.

The thesis investigates whether the relationships between national television markets and their agents, and the European Union can create a level playing field in European television. It also examines the consequences for EU policy aims of the contradictions in the 1989 text, in particular the social, cultural and economic objectives. The interest in easing the free flow of television is shaped by specific national market structures and cultures in the Member States and must be balanced against the need to protect the consumer and the viewer. These relationships reflect the conflicting standpoints within the EU and within individual Member States in creating a competitive television industry, while at the same time reaching a balance between diverging cultural and political objectives. Implementation of the TWF Directive at the national level, whether by law, regulation or administrative action implies different levels of requirements and of enforcement which result in EU rules becoming workable.

⁷⁷ De Salas, A. (1997) *Communication Commerciale et télévision: Droit européen et comparé*, Doctoral thesis in Law, Université Panthéon-Assas, Paris II, France, 29 January 1997, Marseille: Presses Universitaires d'Aix-Marseille/Economique.

The study will argue that the different ways in which regulation is put into place nationally are influenced by political interests and commercial pressures, as well as by national legal systems. They affect the main source of television finance and are likely to have an effect on the nature of both national and European broadcasting systems. Because cultural and political issues at the national level are not yet resolved, and because the economic perspective embodied in the advertising provisions of the European text is unable to overcome them, there is very little hope for a uniform European regime.

I. 4. The study

This thesis will address a number of issues:

First, in some countries we see a slippage in national regulation from minimum standards and mutual recognition to absolute standards. The TWF Directive requires all television services (both transfrontier and domestic) embodied in the TWF Directive to meet minimum standards. Standards regarding advertising and sponsorship for domestic channels may be more restrictive, -although Member States can also choose not to apply the TWF Directive to local television services. The TWF Directive advocates not a harmonisation but just an acceptance of minimum standards which would ensure free movement of transfrontier services. There seems to be a central contradiction in what the TWF Directive text has achieved. National regulation, in the form of law, regulation or administrative action was required to meet these standards. Political and commercial pressures nationally, as well as the different legal systems, account for fundamental differences in television advertising regulation that still remain within EU Member States. How do the different levels of incorporation of the advertising provisions into the national legal systems, whether by law, regulation or administrative action- relate to the workability of these provisions? How do regulatory issues differ in the countries studied and do

they explain whether the European text has been able, or not, to apply “minimum standards and mutual recognition” in television advertising?

Under the Maastricht Treaty, the approach is different. As the principle of subsidiarity takes over the regulatory process at the European level, regulation may well become more diverse, less “co-ordinated”, and it will remain even more subject to domestic pressures. Although the European Parliament now has more powers, the issue is how to resolve the contradictions between the desire by Member States to keep political autonomy versus the push for a Single European Market in television advertising. What are the implications of this approach for the 1997 TWF Directive, and for audio-visual policy in the light of new media? Some provisions in the TWF Directive have partly been transposed into self-regulatory codes of practice. What is the role of self-regulation? Will the regulation of television advertising remain nationally-oriented in some countries, whereas others will choose more European-oriented rules? If regulation of advertising remains within the national domain, would self-regulation be just as good?

Second, the TWF Directive was intended to provide a level playing field for establishing national regulations which would allow transfrontier television to be broadcast within Europe. With regard to advertising it aimed to ensure that a Member State would not prevent foreign television services from being shown and distributed, provided that they complied with domestic regulation in the country of origin.

Two problems which affect transfrontier television arise from the national interpretations of the TWF Directive: First, the question of jurisdiction affects channels originating in one country which are broadcast in another, where the advertising and programme regulations are more restrictive. Domestic services, if regulated in a more restrictive way, have different conditions

for financing. This will become crucial when the enlargement of the European Union incorporates countries with long-standing broadcasting restrictions and where commercial television is not strong enough to exert pressure or communicate with regulators. The same problem appears with the incorporation of countries with a more liberal standpoint, especially in the field of advertising and minors or morals. The nature of competition between domestic and transfrontier channels is set by different rules. Where do the systems of control lie at the transfrontier level? When advertising is carried on a pan-European channel, how will cross-border complaints be resolved? The second jurisdictional problem raises questions about the workability of the TWF Directive. In the light of the confirmation by the ECJ that the country in which a broadcaster is established is the country with jurisdiction over that broadcaster, the possibility of a different Member State exerting a second control is not possible, unless for reasons of misleading advertising. If only matters of public health and misleading advertising, are able to break the principle of country of origin, the focus shifts to the definition of these concepts. If the country of origin is to be the jurisdictional cornerstone, how are more strict national restrictions grounded in the protection of minors or public health to be enforced? To what extent are these concepts harmonised?

Third, a common advertising strategy across Europe could help finance transnational European television. However, advertising is still quite national, financing national television channels, and playing by national regulatory rules, partly because of cultural differences in the audience. The European text has allowed transfrontier television, but because the pan-European audience does not yet exist, these systems have found it difficult to attract many pan-European advertisers to finance them. The divergence in national interpretations prevents this common strategy from happening. Advertisers must comply with every country's rules, and buy airtime on a national basis, even for international campaigns. Big players in European domestic television tend to organise their selling activities at a European level, but keep their product at

the domestic level. Audience differences account for this, but differences in regulation also structure the market. The issue is that the implementations of the TWF Directive's provision for advertising have commercial implications for a European television regime where national broadcasters compete with transfrontier broadcasters operating under different regulations. What are the implications for new television distribution systems? New forms of advertising such as "telepromotions" or "teleshopping" have developed enormously since the 1989 TWF Directive was enacted. What is the part they play in the national interpretations of the TWF Directive, and what are the implications of these new forms for new media policy? How are they defined?

The regulatory bodies can employ a range of sanctions. The differences lie in the type and amount and in the procedures, whether administrative or judicial. It is obvious that the differences in sanctions exert influence over who is ultimately responsible for complying with the rules. The existence of sanctions and controls can allow for viewer involvement and consumer protection, or just keep commercial competition under control. The powers transferred to them are diverse and in some cases these bodies control and sanction, but do not have proper regulatory powers.

Fourth, the thesis looks at the implications of having the different standpoints within European regulators over cultural, political and economic objectives about television and television advertising. How do the national implementations of the TWF Directive echo these? There are also various ways of regulating different television delivery systems, establishing different regulations for two separate sectors of the market: Terrestrial versus cable and satellite, public versus private broadcasters. What are the implications for public broadcasting in the EU?

The study will investigate these questions through the analysis of some key issues in the national transpositions of the TWF Directive, and how they are resolved. The issues are organised in the categories set out in the 1989 TWF Directive: Television advertising, sponsorship, surreptitious advertising and direct offers to the public. Under each one, issues about the implementation of the provisions in Chapter IV of the TWF Directive will be analysed. The main issues are television airtime limits, advertisement content restrictions and prohibitions, frequency, position and number of commercial breaks, identification of sponsors, position and number of sponsor credits, editorial freedom of broadcasters, product and advertiser presence within programmes, undue prominence of products.

CHAPTER II

TELEVISION AND ADVERTISING IN EUROPE

II. 1. Introduction

Advertising is a form of commercial communication for advertisers, where television is just one of the many different media carrying advertising, for instance radio, cinema or the press. The European Directive *Television without Frontiers* (TWF Directive) ensures that broadcasters are subject to the law of the Member State where they are based. Each State must comply with a set of common rules known as the “co-ordinated fields”. Advertising and sponsorship are one of these co-ordinated fields. They represent the main source of funding for many television broadcasters in the European Union (EU). The European Commission (EC) states that these sectors also contribute to the development of the film and television production industries, one of the audio-visual objectives of the EU¹. Advertising is a strong financial resource for most of European television and its role in shaping the map of EU television should not be underestimated. The amount of advertising and other related activities help to determine the type and number of the broadcast services available to European viewers.

Changes in technologies have affected the way advertising is carried and also how television is broadcast in Europe. Along with the well-established, free-to-air, terrestrial television, there is increasingly new space for advertising on satellite and cable channels. But the distribution of advertising in Europe has suffered as well as profited, from the fragmentation of the audience as a result of more channel availability. European television is becoming

¹ The European Commission, “Commercial Communications”, ISEC/B14/96, background report, London, November 1996, 4.

more complex and advertisers have to adapt their strategies and budgets accordingly. The size and growth prospects for advertising expenditure are driven by economic and regulatory forces at national and international levels, affecting media prices and uses, and how advertising budgets are allocated between and within media. In 1994, advertising and television sponsorship accounted for forty seven per cent of total television revenue in Europe. Total advertising expenditure amounted to ECU 45,557 million (£35,250 million) in the EU². These revenues have increased in the past years. It seems that the EU television sector has recovered from the recession in 1993. Television advertising increased by seven per cent in 1995 over the 1994 figure of ECU 15,180 million (£11,737 million) to ECU 16,298 million (£13,347 million). The market is set to grow by more than seventy per cent over the next ten years. The expansion is expected to be more in direct household expenditure than in advertising and licence fees³. But today, the latter still hold the larger portion of revenue.

France, Germany, Italy, Spain and the UK have the largest television advertising expenditures in the EU. Their television systems are at different stages of technical and commercial development. Italian television is mostly terrestrial and cable is virtually non-existent, but Germans can receive more than thirty channels, terrestrially, via cable or by satellite⁴. The success of commercially-funded television in these five countries continues to create difficulties for public broadcasters, which continue to lose their advertising share and audience to the private networks, while their licence fee income remains more or less fixed. The competition for advertising revenue is fierce, and the most popular channels tend to sell the most airtime. Except in the UK where the BBC does not carry advertising, public service broadcasters in Europe are suffering from competition as a result of broadcasting

² European Association of Advertising Agencies as cited in the Green Paper on Commercial Communications in the Internal Market, COM(96) 192 final, 8 May 1996, 20.

³ Marcelino Oreja, Commissioner DG X, "European Trump Cards in a Game with Global Players: EU Audio-visual Policy", speech at Medientage Conference in Munich, 14 October 1997.

deregulation in the 1980's and early 1990's. The political response has been to limit the amount and the content of advertisements which can be sold on advertising-funded channels, and to demand increased efficiency from public broadcasters.

II. 2. Advertising as revenue for television in the EU

II. 2. 1. Spot advertising and sponsorship⁵

Advertising revenue is the major source of television funding in the EU. According to Mattelart this is the result of deregulation⁶. Indeed, deregulation provided more airtime for advertising purposes, while bringing down rate card prices. As a result, advertising became a crucial source of revenue for new entrants in the 1990's. In general, more channels mean more supply, but the size of the market also plays an important role.

With the increase in channel availability over the last ten years, broadcast hours have also increased. Whereas in 1985 24-hour broadcasting was rare, in 1995 all the five markets studied in the thesis had at least one domestic channel broadcasting continuously.

Advertising was introduced to European television screens at very different times during the past forty years. In the early days, it was only possible on state-owned channels until deregulation started in the 1980s. In 1955 in the UK, the advertising-funded ITV companies were franchised by a public broadcaster, the Independent Television Authority (ITA), later the Independent Broadcasting Authority (IBA). Spain followed when TVE was established in 1956

⁴ European Audio-visual Observatory (1996) *Statistical Yearbook*, 190.

⁵ Spot advertising and sponsorship are credited towards total channel revenue, though sponsorship should be credited to programme production costs.

⁶ Mattelart, A. (1991) "Advertising in Europe, promises, pressures and pitfalls", *Media, Culture and Society*, Vol. 13, N°4, 551.

and advertising was to be its main source of income. Most other European countries did not allow private television until the late 1980's.

Introduction of Television Advertising	Public channels mix-funded	adv.-funded	Private channels
France	1948		1982
Germany	1953		1984
Italy	1954		1975
Spain	1956		1989
UK ⁷		1955-1993	1993

Source: Adapted from Carat International, Morgan Stanley

Advertisers are not just passive users of television as a carrier for their advertisements. Curran affirms that changes in marketing perspectives, research procedures and data inputs have produced changes in how advertisers have spent their money with important long-consequences for the development of the media⁸. This is especially true in the case of sponsorship as commercially-based communication. To what extent is the sponsor tied to the programme? Sponsorship raises questions of the balance of control between sponsors, broadcasters and producer needs. Melody considered that the distinction between programming and advertising was becoming increasingly blurred⁹. Advertising has become the principal economic resource of the audio-visual industry, it naturally influences television, and has transformed the medium into a “powerhouse for economic growth”¹⁰.

Sponsorship and product placement are growing in popularity. Advertisers, worried about fragmented audiences, have been using sponsorship of television programmes. Other initiatives can generate additional revenues, although they divert revenue away from

⁷ As a result of the 1990 Broadcasting Act new ITV franchises were awarded by the Independent Television Commission by competitive tender to the highest bidder. Awarded in 1991, these franchises started in 1993.

⁸ Curran, J. (1986) “The impact of advertising on the British mass media”, *Media, Culture and Society, a critical reader*, London: Sage, 310.

⁹ Melody (1988) “Pan-European television, commercial and cultural implications for European satellites”, in *Television and its audiences*, Drummond, P. and Paterson, R., (eds.), London: BFI, 279.

¹⁰ Silj, A. (1992) *The New Television in Europe*, London: Libbey, 1.

traditional spot advertising. An example is the supply of programming which gives advertisers the opportunity to influence the content. In some countries, like the UK, this is carefully monitored by regulators, but elsewhere it is left to discretionary criteria.

The penetration of television sponsorship is greatest where it is least regulated. In general the most lenient treatment has been in “Latin” Europe, and notably Spain, Italy and France, where sponsorship can represent up to sixteen per cent of total television revenue¹¹.

II. 2. 2. Other forms of advertising revenue

The most common form of advertisement is a thirty-second slot broadcast during a programme break, or spot advertising. Companies also produce infomercials, of fifteen to thirty minutes in length, which promote a particular product or brand. The definition of an infomercial depends on the country, and it can vary in length and presentation.

Direct response advertising is a kind of direct marketing. It is the answer to increasing pressure from advertisers to measure the effects of their campaigns. Advertisements encourage the viewer to contact the advertiser or the broadcaster for information on the products promoted, usually via telephone or postal addresses. This helps to create a database of potential customers.

Teleshopping is the use of television to sell products with the help of infomercials. Teleshopping is largely done on generalist channels especially when broadcasters do not broadcast their service but continue to pay for the uplink and transponder facilities they

¹¹ Barrett, M. (1996) *Antenna 1996: a report on the sponsorship industry*, 17.

require at other times of the day, or “dark time”¹². How each of these new forms are regulated in the countries studied will be addressed in later chapters of the thesis.

II. 2. 3. Pan-European advertising

Despite strong growth in satellite and cable, the main form of delivery is still by free-to-air terrestrial broadcasters. In Europe, sixty eight per cent of television homes are terrestrial only, while twenty three per cent are connected to cable and nine per cent are able to receive satellite broadcasts¹³.

The commercial viewpoint is that as new media opportunities have arisen, agencies and advertisers have been occupied with audience fragmentation and the need for accurate consumer targeting across Europe. National comparisons are a problem, however. Mattelart points out that the advertising community has a problem in defining the European market, which is not always the same as that of other political, economic, cultural European bodies¹⁴. One of the major difficulties for the advertising industry is to identify what trends, from the various statistics available, are characteristic of a Europe composed of diverse languages, traditions and cultures. According to Siliato, some marketing managers have the mistaken impression that there is a single European market, when arguably there is a collection of national markets where competition in the advertising-supported media already exists¹⁵.

Most television services in Europe are domestic reaching a broad mix of audiences, and in most cases distribution is still terrestrial. Pan-European channels are delivered through

¹² Commission of the European Communities (1995) *Green Paper on Commercial Communications*, Working document, op.cit., 36.

¹³ Norcontel (Ireland) Ltd. (1997) *Economic implications of new communication technologies on the audio-visual markets*, Working document, Appendices, 7 March, 2.

¹⁴ Mattelart, A. (1991) op. cit., 552.

satellite and cable and channels especially directed to niche audiences will probably be further developed with the establishment of digital compression technology. But there are also barriers to the full development of pan-European television. One is finance. Until now, the finance of pan-European satellite and cable television in the EU was mainly through advertising. Most channels which go on the European “hot bird” ASTRA are national advertising funded channels which happen to have spillover audiences in other countries speaking the same language¹⁶. Examples are the German private channels, which have large audiences in Eastern Europe, Austria and Switzerland. Southern countries with less foreign language knowledge do not offer this audience potential, and also have less developed satellite and almost non-existent cable television sectors. Other difficulties lie in the way audiences are measured. These difficulties refer to non-electronic measurement techniques, and sample design. Pan-European channels rely on the aptitude of cable and satellite television as an advertising vehicle but audience levels are difficult to measure and there is no common standard which could be used across the EU. The result is that each channel sells advertising and sponsorship using different data in a market where pan-European advertising budgets are scarce¹⁷. In any event, advertising shares of pan-European television channels are smaller than those of national channels.

Pan-European channels reach only small audiences and face difficult consumer attitudes. Most buyers are nationally based, and according to Boris Kaz from MTV, “the absence of centralised pan-European advertising departments and budgets continues to make the decision-making process of the clients a long and complex one”¹⁸. From the advertiser’s

¹⁵ Siliato, A. (1992) “The European Advertising Market, Comparisons and Analysis”, in Silj, A. (ed.), op. cit., 138.

¹⁶ Roberts, B. (1996) “Will digital resolve Europe’s great divide?”, *Admap*, July-August, 34. A hot bird is the satellite where most of dishes are pointed. In Europe, ASTRA is today the satellite with the dominant position.

¹⁷ Kaz, B. (1996) “Researching the pan-European media market”, *Admap*, July-August, 31.

¹⁸ *ibid.*

point of view, it is difficult to buy pan-European, because of the lack of good audience measurements.

When the TWF Directive was originally being drafted, advertisers thought that satellite would be a good medium to advertise their products. The reality is that very few products are being marketed with the same name, price and targeting policies across the EU. For this reason, advertising campaigns usually focus on the national advantages of their products. These are often culturally different and therefore the bulk of advertising budgets are managed and spent nationally. According to Richeri, this is a major barrier to the development of satellite television services¹⁹.

Other type of problems arise with the advent of new channels and more airtime available. There has been a shift of revenues from the press into television and other media in Europe. However, since the overall level of advertising expenditure is growing, there is the possibility of more advertising revenue for all media. The outcome of the battle for advertising revenue will be framed by economic, political and legal forces. Differences across European television advertising occur in the diverse practices between Member States in selling airtime. Discount practices are different across the EU, from almost eighty per cent in Spain to a mere ten per cent in Germany. Agency commissions differ, as do ways of buying airtime. The main obstacle for centralised advertising budgeting lies in the multiple negotiations and billings that a multinational advertiser has to accomplish in order to mount a European campaign.

Differences in regulation between the EU Member States are still real barriers to transborder television. If, as the Single Market assumes, an advertiser should be free to promote his products and services across Member States without difficulties, then indeed national regulatory

differences are among the real barriers to the development of a Single Market in commercial communications, of which advertising is a major part.

“ ...When prompted (users of commercial communications) 88 per cent of the users (with no differences from one Member State to another) claimed that regulatory differences and restrictions were adding to their difficulties in conducting cross-border commercial communication services”.²⁰

II. 3. Advertising expenditure in Europe: 1986 to 1995

The size of the television markets and their growth rates in Europe in the early 1980's attracted new entrants to the advertising scene, both from the supply side, i.e. advertisers who found new outlets for their messages at better prices, and from the demand side, the media who saw opportunities to compete. In 1985 advertising provided nearly half of the total financing needs of all Community broadcasting enterprises²¹. In 1993, almost ten years later, the proportion was about the same. Advertising and sponsorship accounted for forty seven per cent of total television revenue compared with thirty one per cent from licence fees and twenty two per cent from subscriptions. In 1995, the European television market was over ECU 24,300 million (£19,900 million) including licence fees but excluding revenues from pay-television. The bulk of revenues come from advertising²².

Audio-visual advertising revenues across the EU amounted to some ECU 16,500 million in 1995. Television advertising expenditure represented nearly ninety eight per cent with the remainder largely comprised of cinema advertising²³. In real terms the average adspend growth in Europe was just over four per cent in 1994 and three per cent in 1995. In the EU, display

¹⁹ Richeri, G. (1993) *La TV che conta*, Milano:Baskerville, 82.

²⁰ Commission of the European Communities (1995) *Green Paper on Commercial Communications*, op cit., 9.

²¹ Bruhann as quoted in Collins, R. (1994) “Unity in Diversity? The European Single Market in Broadcasting and the Audiovisual, 1982-1992” *Journal of Common Market Studies*, Vol. 32, N°1, March, 61.

²² Norcontel (Ireland) Ltd., op. cit., Final Report, X/325/97, 15 April 1997, 11.

²³ *ibid.*, Working document, Appendices, 7 March 1997, 3.

advertising, i.e. brand advertising, or total adspend without classified advertising, was ECU 44,861 million (£336,738 million) in 1995, six per cent more than in 1994²⁴. The strongest increases were achieved during the late 1980's, the period of television deregulation. Growth slowed down at the end of the decade and in the early 1990's as the stimulus of television deregulation began to fade and the recession began to spread across Europe.

Table 1 shows the evolution in adspend across media in relation to 1986. Television grew faster than the press, by seven per cent overall between 1986 and 1995. Each year, the growth in television advertising was consistently more than that for any other medium. Even during recession, television advertising fell back less than other media.

	European Union			
	Total	Newspapers	Magazines	Television
1987	112	110	112	115
1988	114	113	110	118
1989	112	111	111	114
1990	107	105	104	111
1991	106	105	101	111
1992	107	104	103	115
1993	96	96	89	100
1994	107	106	102	111
1995	106	104	106	107

Source: NTC 1996

Data in Table 1 refer to total advertising expenditure, including classified advertising in the case of the press. The economic recovery after the crisis of the early 1990's seems to have effected a spectacular increase in television advertising in the EU. In stable market conditions the rate of growth of television adspend is closely linked with the general rate of economic growth. Even during a period of economic crisis, advertising spending in rich countries tended to grow at a reassuring margin above nominal Gross Domestic Product (GDP). As a percentage of GDP, total advertising increased by ten per cent, from 0.61 in 1986 to 0.71 in 1994. Television advertising in the EU rose more steeply as a proportion of GDP. In 1990 it

²⁴ NTC Publications (1996) *The European Advertising and Media Forecast*, 58.

was 0.18 per cent and rose to 0.23 per cent in 1995²⁵. The relationship may be affected by several factors, including the experience in advertising-funded television, the introduction of new television channels and national restrictions on television advertising²⁶. The strong growth in the eighties was the result of a combination of deregulating under-advertised markets, a sudden rise in media capacity, particularly in television and radio, and strong brand and service advertising.²⁷ So far, overall growth in the nineties has been lower than in the eighties.

Table 2

Total European EU display adspend												
At current prices, million ECU												
	Total	Total Print	%	Television	%	Radio	%	Cinema	%	Outdoor	%	
1986	23,668	25,654	61.8	6,193	26.2	1,180	5.0	207	0.9	1,453	6.1	
1987	26,461	28,448	61.2	7,150	27.0	1,285	4.9	218	0.8	1,613	6.1	
1988	30,122	32,110	59.9	8,468	28.1	1,563	5.2	236	0.8	1,802	6.0	
1989	33,829	35,818	59.4	9,664	28.6	1,758	5.2	264	0.8	2,047	6.0	
1990	36,130	38,120	58.2	10,686	29.6	1,884	5.2	285	0.8	2,252	6.2	
1991	38,227	40,218	57.0	11,869	31.0	1,920	5.0	288	0.8	2,370	6.2	
1992	41,027	43,019	54.8	13,681	33.3	2,081	5.1	305	0.7	2,467	6.0	
1993	39,567	41,560	53.1	13,703	34.6	2,180	5.5	312	0.8	2,366	6.0	
1994	42,364	44,358	51.7	15,180	35.8	2,438	5.8	325	0.8	2,508	5.9	
1995	44,861	46,856	51.1	16,298	36.3	2,648	5.9	370	0.8	2,615	5.8	

Source: European Advertising & Media Forecasts, NTC Publications, 1996

As seen in Table 2, print media adspend is still the most important advertising medium in Europe with a share of fifty one per cent of the total in 1995. But the faster growth in television advertising had the effect of increasing television's importance. The television share of advertising expenditure in the EU grew from twenty six per cent in 1986 to thirty six per cent in 1995, greater than the individual share of either newspapers or magazines. It is steadily approaching the US figure of forty three per cent. Fears that Europe could theoretically reach such levels of television advertising terrify consumers' associations and regulators, while commercial interests in the television scene would welcome them.

²⁵ Kagan World Media (1996) *European Television-Country Profiles*, 3; European Audio-visual Observatory (EAO), *Statistical Yearbook 1996*, 280.

²⁶ Norcontel (Ireland) Ltd., op. cit., Final Report, 15 April 1997, 12.

²⁷ Morgan Stanley UK Group (1996) "European Advertising Review, back to reality", Investment Research European Media, 19 June 1996.

Data in Table 3 below reflect the reality of advertising expenditure levels in the EU, where the five countries studied alone represent eighty per cent of total investment in display advertising. If television adspend is expressed as a percentage of GDP, Spain is second to the UK. The rank order is slightly different for television adspend per capita. Italy is second to the UK and in Germany television adspend levels are lower.

Table 3

1994	Real GDP/capita ECU	TV adspend % of GDP	TV adspend ECU/capita	TV adspend per TV HH in ECU
UK	14,750	0.37	54.9	143
Italy	14,983	0.28	43.5	119
France	19,428	0.21	40.6	113
Germany	19,125	0.19	39.9	71.4
Spain	10,320	0.33	34.2	114

Adapted from NTC 1996, EAO 1996.

Another useful measure in comparing markets is the percentage of television revenues per television household (TV HH). The European television universe totals 144.6 million TV HH. Of total television advertising expenditure in 1995, ECU 114 (£ 93.3) was spent per TV HH in the EU on average compared with 66 ECU (£51.2) in 1990, an increase of nearly sixty per cent.

In 1995, total advertising expenditure grew for the second year running in France, Germany, Italy and the UK, but fell back in Spain. Within Europe, some countries weigh heavily: Germany, the third largest advertising market in the world, reached ECU 14,187 million (£11,618 million) of display advertising in 1995 and represented thirty two per cent of total advertising expenditure in the EU. The UK followed with eighteen per cent and France with sixteen per cent. Italy and Spain lagged behind with nine and seven per cent respectively, but they were experiencing a slower recovery from the economic crisis.

Table 4**Display advertising European Union**

ECU million	1986	1995	Real growth 95/94 *
France	4,097	7,165	2.4
Germany	6,276	14,185	4.2
Italy	2,837	3,799	0.1
Spain	1,151	3,108	-1.2
UK	5,290	7,520	4.7

Source: NTC Publications 1996,* in 1990 ct. prices.

In 1995 television grew most rapidly in the UK. Italian television expenditure remained almost the same as 1994, while in Spain, it actually decreased by one per cent.

By media, the analysis of the relative importance of television country by country presents interesting differences. In Germany the press holds a sixty three per cent share of advertising expenditure, but it has fallen since 1986. In 1995, television represented twenty six per cent in Germany, whereas in Italy television accounted for sixty two per cent of total advertising expenditure, and the press share was only thirty three per cent (Table 5).

Table 5

Distribution of display advertising 1995	in %					
	TV	Newsp.	Mags.	Radio	Cinema	Outdoor
France	35.7	18.9	22.6	8	0.7	12.5
Germany	26.5	43.5	19.7	4.9	1.2	4.2
Italy	62	16.4	17	1.8	n.a.	2.8
Spain	43.5	24.5	14.5	11.3	1	5.2
UK	42.6	30.4	16.9	4.3	0.9	4.9
<i>l</i>						
EU Average	36.3	32.6	18.5	5.9	0.8	5.8

Source: NTC

There are different cultural patterns which explain the use of one medium against the other, but economics also count. With the liberalisation of commercial television across Member States television advertising has increasingly replaced printed advertising in relative importance over the last ten years, although both media have grown. Newspaper penetration helps assess the potential for television advertising in a particular country. In Spain and Italy, where newspaper penetration is low, television advertising weighs heavily in the distribution

of total expenditure across media. In countries where penetration is high, for example Germany, it is just as easy for advertisers to reach consumers through the press as through television and the attraction of television as an advertising medium might not be so important²⁸. Because the press in Spain or in Italy is heavily dependent on advertising, the arrival of commercial television is more threatening than in the UK, where television share of advertising is already very high.

The shift of advertising revenue from one medium to another may reflect two economic forces: The first one is a structural shift. Because of the liberalisation of commercial television, advertising budgets are spent more effectively. Differences in how each medium conveys the commercial message also account for the choice by advertisers of press or television. The second is a dynamic one: more advertisers are drawn to television as it becomes more specialised and they can target their specific customers at better prices²⁹. Both tendencies have been at the heart of the battle between television and the press, and the nature of this debate has shifted from being solely commercial to being political also. At the time when television in Europe was being regulated at both the national and the international level, advertisers were shifting their budgets to the new media on offer, and the press had a wonderful opportunity to preserve its precious commercial revenue by trying to convince politicians to make it difficult for television to compete on similar deregulated grounds. In France, Italy and Spain, the press has been a strong lobbying force in shaping regulation of television advertising. The press has defended its interests against the threat of loss of advertising revenue to television.

²⁸ Morgan Stanley UK Group (1994) "The Economics of Television in Europe", Investment Research European Media, 31 January 1994.

²⁹ Commission of the European Communities (1995) *Green Paper on Commercial Communications*, op. cit., 33.

There is also competition between the public and private broadcasters. At the beginning of the 1990's it was common for public broadcasters to achieve an audience share of almost fifty per cent or more. By 1995, very few public broadcasters can claim audience shares of more than forty per cent. Increasingly, private broadcasters also have the highest shares of television advertising revenue. Over the period 1990 to 1995 public broadcasters experienced a decline in both their relative and absolute shares of television advertising revenues. According to Norcontel, public broadcasting's advertising revenue was the only television revenue to decrease over this period³⁰. Competition for advertising revenue drives up prices and advertising slots are sold in advance. Increases in the number of channels result in the supply of more airtime across the EU, but demand is concentrated on relatively few of them. This could change if audiences switch to minority channels. In the end it will depend on cable and satellite penetration rates and on the programme content of these niche channels.

Although television advertising has increased since 1990, both in total and as a percentage of display advertising, there might not yet be enough commercial revenue to fund all broadcasters. It is expected to grow faster than total adspend, as has been the case over the past ten years in the EU³¹. However, the extended practice of discount rates in Spain and Italy has made television available for advertisers with lower budgets, but has resulted in increasing clutter within the breaks, thus decreasing advertising effectiveness.

³⁰ Norcontel (Ireland) Ltd., op. cit., Working Document, Appendices, 7 March 1997, 5.

³¹ NTC (1996) *The European Advertising and Media Forecast*, 5.

The next section of this chapter covers the analysis of the television advertising market in each of the five countries studied in this thesis. The selected countries represent the five biggest television advertising markets in the EU. The analysis first gives an overview of the television map, then studies trends in advertising and sponsorship revenue in the years in which the 1989 TWF Directive was being implemented.

II. 4. Advertising expenditure country by country

II. 4. 1. France

II. 4. 1. 1. Overview

France has 20.8 million television homes. There are five main terrestrial channels. TF 1 and M6 are private and fully advertising-funded. Two channels, France 2 and France 3 are state-owned and support their licence fee income with advertising and sponsorship revenue. Canal Plus derives most of its income from subscription fees, but also complements its revenue with advertising and sponsorship deals. Television viewing in France is at 180 minutes, three daily hours and nine minutes, just above the EU average of three hours³².

Until 1982, French television was mainly state-owned, but the 1982 Law of audio-visual communications abolished the broadcast monopoly and established the *Haute Autorité de la Communication Audiovisuelle* which would licence new channels, and liberalise the conditions of managing terrestrial television³³. In 1984 a new channel was licensed: Canal Plus, a scrambled television service run by Havas, that was mainly financed with subscriptions. Two more advertising-financed channels were licensed in 1985, *La Cinq* and TV6. TV6, a music channel, was later reconverted into M6 a generalist channel. The turning point in the deregulation process was the privatisation in 1987 of TF 1, the major public channel at the time, and of the media firm Havas, which controlled Canal Plus. Television evolved from being totally state-owned into a primarily private structure. In 1992 *La Cinq* collapsed and was transformed into a public service operation, *La Cinquième*, financed by a

³² Zenith Media (1996) *Television in Europe to 2005*, 37.

³³ Law 82-652 of 29 July 1982.

proportion of licence fees and advertising revenue. It shares its frequency with a German-French cultural joint venture, ARTE³⁴.

II. 4. 1. 2. Television advertising

Advertising revenue provides the greatest part of the income of the television channels. In 1980 it accounted for thirty five per cent of total television revenue, and by 1985 it had reached forty per cent. At the time, licence fees still accounted for fifty two per cent of the total³⁵. At the end of the eighties, advertising became a main source of revenue. Growth rates were very strong in the mid-eighties, when commercial airtime offered increased as a result of deregulation. In 1987, when TF1 was privatised, television adspend experienced a thirty six per cent growth. But, at the beginning of the 1990's, legislation regulating alcohol advertising and the behaviour of media buyers damaged the advertising market in France³⁶. The collapse of *La Cinq* in 1992 helped to reduce growth rates. In 1995, television advertising expenditure recovered from the recession, and it grew by almost eight per cent. Only cinema advertising expenditure grew faster in the same year.

Table 1.1.
Annual change in %

	Total	Newspap.	Magazines	Television	Radio	Cinema	Outdoor
1987	15.2	15.2	9.8	35.8	1	-19.4	9.3
1988	14.9	11.2	11.1	26.8	12.2	-6.3	11
1989	11.3	12.2	11.8	13	5.9	1.4	9.4
1990	8.5	5.8	9.1	9.9	6.1	9.1	10.5
1991	-1.4	-5.6	-4.9	6.1	-5	-24	1
1992	1.3	-4.6	-0.5	7.1	5.3	2.9	-1.1
1993	-4.0	-2.2	-13.7	1	6.2	-15	-4.9
1994	5.2	5.6	3.4	7.3	4	2.9	3.5
1995	4	1.8	2.3	7.7	1.3	7.9	2.2

Source: NTC 1996

³⁴ Gavalda, C. and Piaskowski, N. (1995) *Droit de l'Audiovisuel*, Paris:Lamy, 5.

³⁵ Jezequel, J-P. and Pineau, G. (1992) "French Television", in *The New Television in Europe*, Silj, A. (ed.), London: Libbey, 454.

³⁶ Law 91-32 of 10 January 1991, JO of 12 January 1991 *Loi Evin*, bans the advertising of alcoholic products. Law 93-122 of 29 January 1993 on the prevention of corruption and on the transparency of the economic life and public procedures, JO of 30 January 1993 *Loi Sapin*, regulates relationships between media buyers, agencies and clients.

In 1995, television adspend reached FF. 16,704 million (£ 2,122 million), almost three times the 1986 level (see Table 1.2). Other media, especially print media, have experienced reductions in adspend revenue with television acquiring an ever larger share of total advertising adspend, up to almost thirty six per cent in 1995, an increase of more than ten percent of market share since 1986. The press, on the other hand, lost a similar proportion over the same period.

Table 1.2.

Distribution of advertising by media, million FF.

	Total	Print	%	Television	%	Radio	%	Cinema	%	Outdoor	%
1986	27,860	14,870	53.4	5,890	21.1	2,630	9.4	490	1.8	3,980	14.3
1987	32,085	16,685	52.0	8,000	24.9	2,655	8.3	395	1.2	4,350	13.6
1988	36,865	18,545	50.3	10,140	27.5	2,980	8.1	370	1.0	4,830	13.1
1989	41,043	20,768	50.6	11,460	27.9	3,155	7.7	375	0.9	5,285	12.9
1990	44,534	22,339	50.2	12,600	28.3	3,346	7.5	409	0.9	5,840	13.1
1991	43,923	21,168	48.2	13,364	30.4	3,180	7.2	311	0.7	5,900	13.4
1992	44,483	20,668	46.5	14,309	32.2	3,350	7.5	320	0.7	5,836	13.1
1993	42,713	18,883	44.2	14,450	33.8	3,558	8.3	272	0.6	5,550	13.0
1994	44,955	19,725	43.9	15,505	34.5	3,700	8.2	280	0.6	5,745	12.8
1995	46,754	20,131	43.1	16,704	35.7	3,747	8	302	0.6	5,870	12.6

Source: NTC 1996

In 1993, the Sapin Law was supposed to introduce transparency to media transactions. When agencies were commissioned by an advertiser to purchase advertising space, the medium would pay back to the agency a commission of fifteen per cent of the invoiced advertising space, which was in fact paid by the advertiser. As volumes and billings grew, so did agency margins. The economies of scale from the higher volumes were retained by agencies rather than being shared with advertisers³⁷. The latter did not always know the real rates at which they were buying space, but just the invoice. Media buyers such as Carat and Zenith, are wholesalers who buy enormous volumes of airtime at good discounts at the beginning of the year, and then resell this airtime. According to Logeais, in 1991 four of them purchased

³⁷ Morgan Stanley (1996) "France, EURO RSCG", Investment Research European Media, 13 March 1996.

seventy two per cent of space³⁸. As the function of media buyers is to recommend one medium or one channel, against all others, the commissions were questioned by advertisers, who saw their advertising costs rise.

The Sapin Law aimed to ensure that all clients were offered the same rates. It forced the media to clarify their prices, their conditions of sale, their discounts and rebates. It also forced media buyers and advertising agencies only to be paid by the advertisers, never by the medium. One of the likely effects of the Sapin Law is that, up to 1993, the large discounts offered by the press influenced buyers of space to recommend this medium. It may not be the same under the Sapin Law, since the advertising agency gets a higher commission from a television campaign than from a newspaper insertion³⁹. Discounts erode agency benefits in a fully transparent system, since any savings by discounts revert directly to the advertisers.

In 1995 terrestrial television was dominated by rows over advertising prices. Public broadcasters France 2 and France 3 were accused of unfair competition by cutting their prices by almost a third. In Autumn 1994, the *Conséil Supérieur de l'Audiovisuel*, the regulator, relaxed the regulations for public broadcasters regarding inserting advertising breaks between programmes. The public channels may now interrupt programmes before 8.00 p.m., with the exception of film and documentaries, which must not be interrupted at all. This has obviously increased their offer of airtime, and they decreased their prices in 1995⁴⁰. This practice of cutting rates by up to fifty per cent for larger advertisers may hinder the net growth of revenues. The market leader TF 1 saw both its audience share and share of advertising revenue fall due to increasing competition from the public broadcasters and cable

³⁸ Logeais, E. (1993) "New Regulation of the French Advertising Market: Is transparency to follow confusion?", *Entertainment and Law Review*, Vol. 4, Issue 2, March-April, 54.

³⁹ *ibid*, 5.

⁴⁰ Kagan World Media (1996) *European Television Country Profiles*, 61.

channels. Cable already accounted for four per cent of the audience share in 1995. However, as seen in Table 1.3. private channel TF 1 continues to hold the largest share of viewers.

Table 1.3. 1994 in %

<i>Channel</i>	<i>Share of audience</i>	<i>Share of TV adspend</i>
TF 1	39	59
FR 2	25	15
FR 3	16	8
M6	11	14
Canal	5	4
Plus	4	N.A.
Others	210	
<i>Minutes</i>		
<i>Source:</i>	<i>EAO</i>	<i>Kagan</i>

TF 1 derives eighty four per cent of its revenue from advertising and sponsorship, a category which experienced almost eight per cent growth in 1994. In the same year, the public channels increased their revenues, as well as their audience share. France 2 derives fifty six per cent of its income from public funds, forty one per cent from spot advertising and three per cent from sponsorship. Its audience share has increased slightly since 1992. France 3 saw its audience share grow by almost two points in 1994 up to almost sixteen per cent from almost fourteen per cent in 1992. France 3 is financed seventy one per cent by public funds. It derives almost twenty per cent of turnover from spot advertising and two per cent from sponsorship. M6 is almost entirely funded from advertising revenues. Its share of audience is almost twelve per cent, and it is growing. It derives ninety six per cent of its turnover from spot advertising and four per cent from sponsorship⁴¹.

⁴¹ CIT (1996) *Media Map*, 99-100.

II. 4. 1. 3. Sponsorship

Television sponsorship started in France in the early eighties. France now has one of the best developed programme sponsorship sectors in the EU after Spain and Italy. Sponsorship accounts for almost nine per cent of total advertising revenues.

TF 1 has over half of the sponsorship market. The profile of French television sponsors is somewhat different from that in other European countries, since it is most used by certain sectors banned from using spot advertising on television. Publishers, the cinema, the press and distribution stores or *secteur distribution*, may however sponsor programmes⁴². Especially the distribution and media sectors make heavy use of sponsorship.

II. 4. 2. Germany

II. 4. 2. 1. Overview

Germany is the largest television market in Europe, with 32.7 million TV households. It is also the most competitive market in the EU with more than twenty national television channels distributed both terrestrially and via cable and satellite. In 1996, Germany was the largest cable television market in Europe, with almost twenty million homes passed by cable and sixteen million cable homes connected, a penetration of almost seventy per cent⁴³. At the end of 1996 there were ten million satellite households in Germany, thirty one per cent of total households.⁴⁴. All satellite channels are relayed by cable. Although investment in the

⁴² Article 8, Decree 92-280 of 27 March 1992 regulating advertising and sponsorship; Article 19 only bans from sponsorship tobacco products, medicines on prescription and alcoholic drinks, JO of 28 March 1992.

⁴³ MediaGruppe München, "The German Television Market", presentation in November 1996.

⁴⁴ Morgan Stanley (1996) "German Digital Television: Dancing in the Dark", Investment Research European Media, 7 November 1996.

Eastern *Länder* is increasing, only thirty four per cent of homes had been passed at the end of 1995, and nearly two million homes were connected.

The first commercial channels were delivered via cable and satellite in 1984. Ten years later, RTL was the first channel to overtake the public channels' share of viewing. RTL and SAT 1, the main private channels already reach ninety four of television households, but the rest of the private stations only reach eighty per cent. Only the two public broadcasters, ARD and ZDF, have full terrestrial distribution and cover 99.9 per cent of the German population. Because of the high penetration of cable and satellite, the relay of major terrestrial channels without full coverage is not a problem and it has not prevented them from increasing both audience and advertising shares.

II. 4. 2. 2. Television advertising

Television channels have flourished within a buoyant advertising market. Since the launch of the first commercial channels, television advertising has experienced phenomenal growth. In 1995 it amounted to DM 7,047 million (£3,118 million), growing by almost thirteen per cent over 1994, four times the amount spent in 1986.

Table 2.1.
Share of display advertising by media, total in million DM, current prices

	Total	Print %	TV %	Radio %	Cinema %	Outd. %
1986	13,357	77.3	12.4	4.8	1.2	4.3
1987	14,118	76.8	12.7	4.9	1.3	4.2
1988	15,384	75.4	13.2	5.7	1.4	4.2
1989	16,783	74	14.9	5.6	1.3	4.1
1990	18,236	71.6	17.4	5.5	1.3	4.2
1991	20,879	69.9	19.7	5	1.2	4.1
1992	22,800	68.8	21.1	4.8	1.2	4.1
1993	23,189	66.8	23.1	4.8	1.3	4
1994	24,986	64.4	25	5	1.2	4.3
1995	26,584	63.2	26.5	4.9	1.2	4.2

Source: NTC 1996

Television has consistently grown faster than the press during the last ten years, almost three times faster in 1995. The highest levels were in the late 1980s and early 1990s, when the effect of reunification was combined with the strong growth of private channels. In relation to 1986 figures, television increased its share thirteen per cent in 1995, more than any other medium. In 1986 television represented only twelve per cent of advertising. Since then, this has more than doubled, and in 1995 it represented 26.5 per cent of total display adspend.

Table 2.2.

Annual change in %

	Total	Print	Television	Radio	Cinema	Outdoor
1987	5.7	5	8.2	7.9	21.9	4
1988	9.0	7	13.3	26.8	10.1	9.8
1989	9.1	7	23.1	6.6	8.2	5.8
1990	8.7	5.1	26.6	7.6	5.8	9.7
1991	14.5	11.8	29.6	4.4	5.5	13.5
1992	9.2	7.5	16.8	3.4	6.8	9.1
1993	1.7	-1.3	11.5	2.5	8.2	-0.9
1994	7.7	3.9	16.7	12.9	5.9	14.4
1995	6.4	4.4	12.6	2.5	7.2	4.7

Source: NTC 1996

Despite the arrival of so many new channels in the nineties, Germany's three leading commercial channels, RTL, SAT1 and Pro 7 dominate the share of television adspend. RTL captured 17.5 per cent in 1994. Viewing time in Germany remains low, at 179 minutes in 1994, almost three hours per day on average, compared with the UK (three hours and thirty minutes) or Italy (three hours and forty eight minutes), but it has grown significantly from 157 minutes in 1990⁴⁵. The result is an audience fragmented between all channels. The most severely affected are the public broadcasters, which have seen their shares of audience and adspend drop considerably.

ARD dropped from forty three per cent share of viewing in 1985 to a mere sixteen per cent in 1994, and ZDF, from just under forty three per cent in 1985 to seventeen per cent in 1994. Meanwhile, private broadcasters RTL and SAT 1 have grown steadily since starting with low

audience levels when they were founded, to between fifteen and eighteen per cent each. Other successful private channels also account for the loss of audience of the public broadcasters. Pro 7, which took only nine per cent of the audience in 1990, now has almost fifteen per cent.

Table 2.3.

<i>Channel 1994</i>	<i>Share of viewing %</i>	<i>Share of TV adspend %</i>
ARD	16.3	4.5
ZDF	17	6
RTL	17.5	33.4
SAT 1	14.9	27.8
Pro7	9.4	19.9
Other	24.9	8.4
Total minutes	179	

Source: Kagan 1996- MGM

In 1994, ARD only managed to attract DM 256 million from advertising, which represented a forty two per cent drop from 1993. ARD derives 8.6 per cent of its revenues from advertising, and its share of television adspend was only four per cent in 1994 (Table 2.3.). In 1995 ARD increased its advertising revenue by eighteen per cent, an upturn from 1994, and a bigger growth than the total television revenues (Table 2.4.)⁴⁶. However, its share of the television adspend was only just under five per cent.

ZDF followed the same trend, up almost three per cent from 1994, and reversing the ten per cent drop of 1994 over 1993. ZDF's share of adspend was around six per cent, accounting only for sixteen per cent of its revenue, down from thirty one per cent in 1992⁴⁷. Both broadcasters started to discount their airtime by twenty five per cent in 1995, but have been

⁴⁵ MGM, "Media Vision 97", presentation in November 1997, ZenithMedia, *Television in Europe to 2005*, 44.

⁴⁶ Heffler, M. (1996) "Moderates Wachstum und konsolidierte Marktanteile der klassischen Werbeträger", *Media Perspektiven*, N°6, 290.

⁴⁷ European Audio-visual Observatory (1996) *Statistical Yearbook*, 194.

lobbying heavily to liberalise their airtime restrictions and in favour of licence fee increases of almost nineteen per cent⁴⁸.

Table 2.4.

Channels	1994 Million DM	in 1995 in Million DM	1995 in %	1995/1994 change in %
ARD	255.9	301.8	4.8	+17.9
ZDF	335.8	345.1	5.4	+2.8
Public TV	591.7	646.9	10.2	+9.3
RTL	1,881.8	1,960.1	30.9	+4.2
SAT 1	1,564.6	1,623.8	25.6	+3.8
Pro 7	1,121.8	1,333.9	21	+18.9
RTL2	240.3	326.5	5.1	+35.9
Kabel 1	61.4	151	2.4	+146
VOX	50	113	1.8	+126
Viva	26.5	52	0.8	+96.2
D. S. F.	60	70	1.2	+16
Others	35	64.8	1	+85.1
Private TV	5,041.4	5,695.1	89.8	+13
TOTAL	5,633.1	6,342	100	+12.6

Adapted from *Daten zur Mediensituation in Deutschland 1996, Media Perspektiven*

Public channels together took only ten per cent of the market in 1995 partly because they have less airtime available. Selling practices are strict. There are not many discounts in Germany, and most airtime is sold in advance.

II. 4. 2. 3. Sponsorship and other forms of revenue

Programme sponsorship started in Germany in 1992. Most of the sponsored programmes are sport events. The usual format is to show the sponsor's credit at the beginning and at the end of the programme.

Teleshopping is available in Germany on most of the private channels. There is a dedicated channel, HOT, which was launched by Pro7 and the mail order company Quelle in 1995.

⁴⁸ CIT (1996) op. cit., 110; ZDF and ARD can only advertise for 20 minutes per day on weekdays before 8 p.m.

II. 4. 3. Italy

II. 4. 3. 1. Overview

Italy has 20.5 million television households and one of the largest audience viewing level in Europe with Spain and the UK, at 228 minutes per day. This means almost four hours a day in a country where television is essentially terrestrial. Television is dominated by two companies, RAI and Mediaset, whose six national channels constitute ninety per cent of audience share and fifty six per cent of total display advertising.

Television is a mixed system: A combination of public channels, financed by a licence fee and advertising, and national and local private channels, entirely financed by advertising⁴⁹. Nine national licences were sanctioned in January 1993: Three to RAI, three to RTI (Mediaset), and one each to TeleMontecarlo, Videomusic and Rete A⁵⁰. Cable and satellite television are not very well developed, with only 600,000 dishes -small when compared with other more developed markets, Germany (eight million) or the UK (2.5 million)⁵¹. TelePiù is the only pay-TV channel. At the moment it is terrestrially delivered, but it will gradually switch to satellite. At the beginning of 1996 it had 750,000 subscribers.

II. 4. 3. 2. Television advertising

Italians are bombarded with television advertisements. The distinctive feature is the use of television by quite small businesses. This is possible because of the extended presence of local stations and the availability of airtime at reasonable prices. The result is that television

⁴⁹ Law 223 of 6 August 1990 regulating public and private radio and television broadcasting, *Legge Mammi*, GU 185 of 9 August 1990.

⁵⁰ Kagan World Media (1995) *The 1995 European Advertising Report*, 178.

⁵¹ Gruppo Fininvest and Mediaset (1996) Public Offer, Milano, June 1996, 45.

dominates the advertising market with sixty two per cent of display advertising. Terrestrial channels deliver a stable situation in the battle for audiences. Local television competes with the press for regional and local advertising revenue.

Since 1990 television advertising has grown faster than the total advertising market. Italy's total television adspend in 1995 was Lit 4,897 billion (£1,905 million), double the level of 1986. It grew strongly in the mid eighties with the growth of Fininvest. The economic recession in the early nineties meant smaller growth rates especially in 1993. Television adspend in 1993 increased only 0.6 per cent more than in 1992 (see Table 3.1). It seems that television adspend has now experienced some recovery and in 1995 it grew by six per cent from 1994⁵².

Table 3.1.
Annual change in %

	Total	Print	Television	Radio	Other
1987	22.3	27.6	17.6	13.2	27.9
1988	12.3	7.3	16.5	24.7	14.2
1989	9.4	11.4	7.4	7.3	14.2
1990	9.7	7.4	11.6	6.8	13.2
1991	7.3	3.0	11.3	6.4	5.2
1992	9.1	5.5	12.5	3.4	3.9
1993	-8.4	-19.8	0.6	-11.6	-17.3
1994	2.0	-1.8	5.2	3.7	-15.2
1995	5.6	4.5	6	26.1	0.4

Source: NTC 1996

Television advertising represents almost two thirds of total advertising, almost double that of the press. The influence of television grew considerably from the 1980's. From 1986 to 1995 the television share increased ten percentage points, from fifty one per cent to sixty two per cent. In the meantime, the press lost these ten percentage points, but lower readership may also play a part. According to Mediaset, the number of newspapers per capita is four times higher in Finland, Sweden, three times higher in Germany and in the UK where newspapers

⁵² *ibid*, 37.

register more than forty per cent of total adspend. In any case, the press grew in 1995 at almost five per cent, in line with the five per cent growth in the EU⁵³.

Table 3.2.

Distribution of display advertising by media, at current prices, billion Lit.

	Total	Tot. Print	%	Television %	Radio %	Other %	%		
1986	4,148	1,805	44	2,121	51	68	1.6	154	3.7
1987	5,072	2,303	45	2,495	49	77	1.5	197	3.9
1988	5,697	2,470	43	2,906	51	96	1.7	225	3.9
1989	6,234	2,751	44	3,122	50	103	1.7	257	4.1
1990	6,840	2,955	43	3,483	51	110	1.6	291	4.3
1991	7,342	3,043	41	3,876	53	117	1.6	306	4.2
1992	8,009	3,209	40	4,361	54	121	1.5	318	4
1993	7,333	2,573	35	4,389	60	107	1.5	263	3.6
1994	7,479	2,526	34	4,619	62	111	1.5	223	3
1995	7,900	2,640	33	4,897	62	140	1.8	224	2.8

Source: NTC 1996

The distinctive feature of Italy is the duopoly in television advertising expenditure between Mediaset and RAI. Their combined advertising revenues represent ninety per cent of television adspend, and fifty six per cent of total display advertising. Mediaset's advertising turnover was Lit 2,848 billion in 1994 (£1,153 million), sixty one per cent of the television advertising expenditure. RAI derives forty one per cent of its revenue from advertising and sponsorship activities. Spot advertising alone represented thirty two per cent of total commercial revenues in 1994, sixteen per cent more than in 1993⁵⁴. Table 3.3. shows the relation of share of audience to share of advertising expenditure for both groups.

Table 3.3. 1994 in %

<i>Channel</i>	<i>Share of TV adspend</i>	<i>Share of Audience</i>
Total RAI	31.6	47.3
Mediaset	62.9	43.6
Others	5.5	9.1
<i>Total minutes</i>		219

Source: Kagan, 1996/Zenith Media 1996

⁵³ *ibid.*

⁵⁴ European Audio-visual Observatory (1996) *Statistical Yearbook*, 235.

Fierce price battles between RAI, Mediaset, and more than 600 local stations have led to reductions in rate cards, whilst advertising volume has been growing steadily. In 1994, competition resulted in an almost twenty nine per cent reduction in the cost of a thirty-second commercial at RAI, and twenty four per cent at Mediaset⁵⁵. Discounts are heavy and in some cases they reach sixty per cent. Agency commissions are fifteen per cent, but airtime is usually sold directly by the medium to the advertiser.

II. 4. 3. 3. Sponsorship and other forms of revenue

Spot advertising is reaching a saturation point in Italian television channels, and advertisers have to find new opportunities for communication if they want to be effective⁵⁶. One reason why sponsorship has been popular among advertisers is advertisement clutter. Italy is the largest market for sponsorship in Europe. There has been substantial political pressure in recent years to limit sponsorship revenues coming from this source, as will be discussed in later chapters. Mediaset derives almost seventeen per cent of its revenue from sponsorship and other forms of advertising communications while RAI derives three per cent.

Sponsorship usually takes the form of sponsor credits showing the sponsor's name or logo at the beginning and/or at the end of the programme, with a three to four second reminder at the end of the commercial breaks. Trailers can last up to eight seconds and they show the sponsor's name or logo. A sponsor can also choose to sponsor a complete day's television.

A special form of commercial communication is the "telepromotion". These are advertising sequences that can last from sixty to ninety seconds, and are usually broadcast within a programme so the presenter can introduce the product at a particular moment in the

⁵⁵ Morgan Stanley (1996) "European Advertising Review: Back to reality", Investment Research European Media, 12 February 1996.

programme. Another form of commercial communication is teleshopping. Teleshopping advertisements invite the viewer to buy the product by telephone. Obviously, both types of commercial communication occupy more airtime than spot advertising. In 1994, when the regulator chose to include telepromotions in the daily limit of fifteen per cent, a legal dispute started⁵⁷. Whether telepromotions are considered as a type of regular spot advertising, or as a separate form of advertising has direct impact on television revenues. The issue is discussed in Chapters V, VI and VII of this thesis.

II. 4. 4. Spain

II. 4. 4. 1. Overview

Spain has 11.7 million television households. There are two national public channels, TVE 1 and La 2, and the private channels, Antena 3 and Telecinco, both fully advertising-funded. There is also one terrestrial pay-TV channel, Canal Plus, mainly funded by subscription. A distinctive feature of the Spanish television scene are the *Autonómicas*, eight public regional channels that broadcast in the language of the region. Public broadcasters support themselves through state or regional subsidies and advertising, because there is no licence fee. Another distinctive feature is that Spanish public television was born with advertising as a main source of revenue. Viewing is high at 210 minutes, that is, three and a half hours daily on average⁵⁸. This helps advertisers to choose television as an advertising medium because press readership is low compared to television viewing. In 1986 only eight in a thousand Spaniards bought a national newspaper and the national and regional press combined sold eighty seven copies per thousand habitants, whereas for example in the UK, it was 590 and 727

⁵⁶ Gruppo Fininvest and Mediaset (1996) op.cit., 41.

⁵⁷ Ministerial Decree 581 of 9 December 1993; for a further discussion see Chapter VII on Direct Offers to the Public.

⁵⁸ ZenithMedia, *Television in Europe to 2005*, December 1995, 99.

respectively⁵⁹. In 1993 national newspapers still sold only fifty eight copies per thousand Spaniards⁶⁰.

The introduction of the regional television channels in 1983 and the arrival of commercial television in late 1989 undermined the previous monopoly of TVE⁶¹. Since then, there has been a dramatic growth in the advertising market. Although the market has doubled in value, the increase in volume is greater because of the high levels of discounts on rate cards. Therefore, there is more advertising at lower prices, and that creates revenue problems for all broadcasters.

II. 4. 4. 2. Television advertising

Private television arrived at the end of 1989. It certainly expanded the television advertising market, which grew more than 1.5 times between 1989 to 1992. Television expenditure grew most quickly between 1986 to 1992, in the period when the *Autonómicas* and the private channels were starting. In 1990 constant prices, television adspend grew by fifty five per cent in 1992, the year of the World Expo and the Olympic Games and of a great economic expenditure in general in Spain. The trend did not last long because the development of private television coincided with a deep economic recession which hit the country in 1993. The market crashed and television revenues fell by fourteen per cent, less than the print media.

⁵⁹ Wedell, G. and Luyken, G. M. (1986) *Media in Competition*, Manchester:European Institute for the Media, 38.

⁶⁰ Euromonitor (1998) *European Marketing Data and Statistics*, Table 1305, 310.

⁶¹ Law 46/1983 of 26 December 1983 of the Third Television Channel, BOE 4 of 5 January 1984; Law 10/88 of 3 May 1988 of Private Television, BOE 108 of 5 May 1988.

Table 4.1.
Annual change (1990 prices)
in %

	Total	Tot. Print	Television	Radio	Other
1987	23	25	23	15	3.5
1988	20	24	18	18	2.1
1989	16	17	13	8	45.8
1990	11	12	17	2	6.0
1991	12	11	20	-1	12.8
1992	19	5	55	2	-5.2
1993	-20	-28	-14	-5	-10.8
1994	-3	-6	-1	-2	0.5
1995	-1	-2	-1	4	-0.9

Source: NTC 1996

Although full recovery is not yet in place, television adspend showed a slight recovery in 1995 and reached PTAs 220,124 million (£ 1,119 million, see Table 4.2.). Even at current prices it is still sixteen per cent less than in 1992 since the combination of the economic crisis and heavy discounting eroded television adspend and channel revenues.

Television takes more than forty per cent of total display advertising, and increased its market share by more than ten points between 1986 and 1995 (see Table 4.2). Although the press expanded its share in the late eighties, it suffered a sharp reverse in 1993 and has lost ten points in ten years from almost fifty per cent to thirty nine per cent. The press is losing advertising share against television, but it still represents more than a third of the total market. It is a dangerous trend for the press, since readership is low, and it derives most of its revenue from advertising.

Table 4.2.
Display advertising in million Pta, current prices.

	Total	Print	%	Television	%	Other	%
1986	158,233	78,415	50	45,318	29	34,500	22
1987	205,459	103,566	50	58,453	28	43,440	21
1988	258,205	134,283	52	72,563	28	51,360	20
1989	321,229	167,394	52	87,835	27	66,000	21
1990	381,268	199,747	52	109,762	29	71,760	19
1991	452,828	234,621	52	139,391	31	78,816	17
1992	572,142	260,486	46	228,683	40	82,973	15
1993	480,889	195,983	41	204,445	43	80,461	17
1994	489,071	193,191	40	212,457	43	83,423	17
1995	506,593	197,429	39	220,124	43	89,039	18

Source NTC 1996

Advertisement clutter is a real problem. The number of commercials went up from 214,373 in 1989 to 612,727 in 1992, a growth of eighty six per cent. One other reason for this was the enormous discount given as free airtime by all stations in order to get advertising revenue⁶².

When the government finally implemented the TWF Directive in July 1994, advertising time was increased from ten per cent of the total programming year with a maximum of ten minutes per hour, to fifteen per cent of daily transmission time and twelve minutes per hour. Even so, the Law introduced at least more controls at a time when advertising clutter and discounts were financially damaging for broadcasters⁶³.

Because public broadcasters are funded by both advertising revenues and public subsidies, the loss of audience since the introduction of private television has resulted in heavy financial problems. TVE has a stable audience share at thirty seven per cent, followed by Antena 3, as seen in Table 4.3. As in France, public broadcasters are being accused of unfair competition because of this double funding. TVE derived almost seventy per cent from advertising, PTAs 71,166 million (£348.3 million) in 1994, that is over thirty per cent of total television adspend. Antena 3 is ninety two per cent financed by advertising, and the remaining eight per cent comes from programme sales. In 1994 its advertising revenues were PTAs 63,034 million (£308.5 million), another third of television adspend. Telecinco, with PTAs 41,412 million (£202.7 million), took twenty per cent of the market. The *Autonómicas* took fourteen per cent of the advertising and fifteen per cent of audience share⁶⁴. Shares of television adspend and audience for 1994 are shown in Table 4.3.

⁶² Fundesco (1993) "*Comunicación social:Tendencias 1993*", Madrid:Fundesco, 99.

⁶³ Law 24/1994 of 12 July 1994, BOE 166 of 13 July 1994, overruled advertising provisions of previous Law of Private Television 10/1988 of 3 May 1988, BOE of 5 May 1988.

⁶⁴ European Audio-visual Observatory (1996) *Statistical yearbook*, 205.

Table 4.3.

<i>Channel 1994</i>	<i>Share of adspend %</i>	<i>TV Share of audience %</i>
TVE	32	38
<i>Autonómicas</i>	15	15
Telecinco	21	19
Antena 3	31	26
Canal Plus	1	2

Source: EAO/Kagan

Media cost inflation was very high during the early 1980's, but then slowed down. In the late eighties, when retail prices increased by eighteen per cent, television costs increased by fifty per cent⁶⁵. Discounts are heavy. Agencies receive commissions of ten per cent of the invoiced airtime bought, paid back by the medium to the advertiser. Volume discounts are also common. According to a senior sales manager in Publiespaña, the sales house for Telecinco, eighty per cent of media buyers' commissions are paid by the media, and twenty per cent, by the agency. This differs from practices in other countries, particularly in France, because of the Sapin Law⁶⁶. Media buyers are financially key clients for Spanish television because they buy in advance and pay for large volumes of airtime.

II. 4. 4. 4. Sponsorship

Sponsorship in Spain was estimated by Carat to cover twelve to fifteen per cent of total television revenue in 1993. Entire programmes are being devised around the sponsor's products which provide enormous opportunity for product placement. Sponsorship is generally sold with enormous discounts. Both public and private broadcasters use this form of revenue, with almost sixty per cent of total programmes being sponsored.

Variations in sponsorship include sponsors' credits and whole programmes centred on a particular product. Active sponsorship means the heavy presence of a particular brand or

logo during the sponsored programme, a small game within the programme where the product is presented, spots inserted within advertising breaks, and more prominence given through sponsor credits at the beginning and end of the programme. Passive sponsorship occurs when the brand is associated with the programme but it is not present within it. In this case the sponsor benefits from the usual formula, with credits at the beginning and at the end of the programme and a spot inserted within each advertising break⁶⁷.

There is strong concern about programme standards and the high level of product promotion. Meanwhile, television advertising regulations are flexible enough to allow these high levels of product promotion, making the boundaries between surreptitious advertising and sponsorship very blurred, as will be discussed later.

II. 4. 5. UK

II. 4. 5. 1. Overview

The UK has 22 million television households, a penetration of ninety seven per cent of total homes. Seven million homes had been passed by cable in June 1996, and 1.5 million homes were connected, representing a six per cent penetration⁶⁸. Almost four thousand homes received satellite channels in 1996, that is a penetration of seventeen per cent⁶⁹.

There are five terrestrial channels, BBC1, BBC2, ITV and Channel 4 and Channel 5. The BBC obtains its revenue mainly through an annual licence fee. Channel 4 is a publicly owned

⁶⁵ Bennett, R. (1993) *The Handbook of European Advertising*, 346.

⁶⁶ Oscar González, Senior Sales Manager, Publicespaña, interview in Madrid, January 1996.

⁶⁷ TF1 (1996) "*Publicité, Parrainage et Autres Formes de Publicité en Télévision dans les Principaux Pays Européens*", Internal Memo, 59.

⁶⁸ Harrison, H. (1996) "The UK cable audience", *Admap*, July-August, 36.

⁶⁹ Euromonitor (1998) *op. cit.*, Table 1313, 318.

channel but financed through advertising. ITV companies are privately owned but have public programming obligations. Channel 5 which does not have complete national coverage, started broadcasting in March 1997, and it is financed by advertising.

Channel 4 was launched in 1982 as a wholly-owned subsidiary of the IBA. It is now a statutory non-profit-making trust. Channel 4 offers a national service complementary to ITV, with a distinct public service remit, to serve minorities, fully represented by the existing broadcasting system. Until 1993, it was funded by a seventeen per cent levy from the combined ITV and Channel 4 advertising revenues, the airtime for the two companies being sold by the ITV companies. Since January 1993, Channel 4 has been selling its airtime independently from, and in competition with, ITV.

The expansion of cable and satellite and the introduction of Channel 5 are the most important forces driving the development of television in the UK. Although there will be audience fragmentation as a result of more channels with the advent of digital television, the estimates are for ITV to remain the largest mass-media entertainment vehicle, though its share of audience is diminishing⁷⁰.

II. 4. 5. 2. Television advertising

Television advertising grew strongly in 1987 and 1988 along with the economy and when the maximum airtime allowed by the IBA, the regulator, was increased from 6.5 minutes to 7.5 minutes per hour. Broadcasting hours were also increased. With the economic recession, television adspend also slowed down, and decreased by almost two per cent in 1991. Advertising started to increase again in 1992, with the recovery of the UK economy since 1992. In the period from 1990 to 1995 advertising grew one per cent per year, and on average

it reached a 0.42 per cent share of GDP per year in the same period. In the next five years advertising is expected to increase at a three per cent rate⁷¹.

Table 5.1.
Annual change in %

	Total	Print	Television	Radio	Cinema	Outdoor
1987	12	11.1	12.6	21.7	12.5	12.3
1988	13.4	12.4	13.9	24.8	22.2	12.7
1989	10.3	11.9	7.7	15.1	31.8	10.8
1990	-0.4	-1.9	0.7	2.1	10.3	4.6
1991	-3	-3.6	-1.9	-8.1	6.3	-5.3
1992	4.8	2.6	7.2	5.1	8.8	6.1
1993	4.1	1.8	5.2	23.8	8.1	5.7
1994	10	7.7	10.7	24.9	7.5	16.7
1995	8.1	6.5	8.2	21.7	32.6	7.9

Source: NTC 1996

Television's share of advertising is stable at around forty two per cent. The press has lost five per cent in the past ten years, but the fastest growing media have been radio and the cinema. More UK advertisers are favouring below-the-line advertising methods, like loyalty schemes, which reduce budgets from above-the-line media, television in particular. Media inflation and a less favourable economic outlook can account for this.

Table 5.2.
Display advertising in million pounds

	Total	Print	%	TV	%	Radio	%	Cin.	%	Outdoor	%
1986	3,553	1,859	52.3	1,441	40.6	83	2.3	16	0.5	154	4.3
1987	3,981	2,066	51.9	1,623	40.8	101	2.5	18	0.6	173	4.3
1988	4,516	2,323	51.4	1,849	40.9	126	2.8	22	0.6	195	4.3
1989	4,979	2,599	52.2	1,991	40	145	2.9	29	0.6	216	4.3
1990	4,959	2,550	51.4	2,004	40.4	148	3	32	0.7	226	4.6
1991	4,808	2,459	51.1	1,966	40.9	136	2.8	34	0.8	214	4.5
1992	5,039	2,524	50.1	2,108	41.8	143	2.8	37	0.8	227	4.5
1993	5,244	2,570	49	2,218	42.3	177	3.4	40	0.8	240	4.6
1994	5,769	2,769	48	2,455	42.6	221	3.8	43	1	280	4.9
1995	6,234	2,950	47.3	2,656	42.6	269	4.3	57	0.9	302	4.8

Source: NTC Publications, 1996

Advertising remains the principal source of commercial television revenue, accounting for almost sixty two per cent of the total £ 3.7 billion income in 1995. Airtime in the UK is sold in advance and on the basis of the Station Average Price Index, the ratio between average

⁷⁰ Harrison, H. (1996) op. cit., 36.

monthly impacts and the universe of the target audience. Obviously, this ratio fluctuates every day, so the average monthly ratio is used. Media inflation is an issue for the advertising industry, which measures the effectiveness of their campaigns in terms of cost per thousand people reached. According to Bunter, falling audiences for many stations have an inflationary effect on these costs per thousand (CPT). ITV airtime increased by seven per cent in 1996 over 1995, and Channel 4 rates increased by twenty per cent in the same period. Bunter states that Channel 4 was considered to have been under-priced when it started to sell its own airtime in 1993, and that this is the reason for the increase in cost. Channel 5 means more airtime on offer, and it could help cut television inflation in half with the help of competitive, stripping schedules⁷².

Cable and satellite increased by twenty seven per cent in their advertising revenue, to about six per cent of total television adspend. BskyB, the largest company in the cable and satellite sector and mainly funded with subscriptions, derived twelve per cent from advertising⁷³.

Table 5.3.

Total net advertising revenue by channel in %

Channel	1995	1994
ITV	74	75
Ch.4	20	19
Others	6	6
Total	£2,3 bn	£2,1 bn

Source: ITC Annual Report, 1996

However, ITV is still the most successful channel among the advertising-funded stations, with thirty nine per cent of audience share and seventy four per cent of the market in 1995.

All stations measure their performance against ITV's on the Station Average Price.

⁷¹ Norcontel (Ireland) Ltd. (1997) "Economic implications of new communication technologies on the audio-visual markets", study prepared for DGX/D/3, Final Report, 15 April 1997, 76.

⁷² Financial Times (1996) *The Future of UK Television*, Dr Helen Bunting, 21.

⁷³ ITC (1996) *Annual Report*, 12.

Since ITV is a compound of different licensees, its airtime is sold by three different sales houses, each of which get almost a third of total ITV revenue. Agencies and advertisers have to deal separately with these sales houses if they want to reach national coverage with ITV, while dealing with Channel 4, Channel 5 or BskyB, involves just one negotiation. Agencies and media buyers are remunerated by a commission, on average, fifteen per cent of the invoiced advertising space. There are no quantity discounts, and negotiations are usually on a client by client basis, transparent and as a general rule and accountable. Price discounts are between five and ten per cent⁷⁴.

II. 4. 5. 3. Sponsorship

Sponsorship is difficult to quantify exactly because there are many factors, for example discounted spot airtime included in package deals, or help with sales promotional activity, or contributions to the cost of producing the sponsor's credits, or just public relations work with programme stars. In 1995 sponsorship represented almost two per cent of net advertising revenues for the commercial channels. Growth of sponsorship in the UK is slow, even compared with highly regulated markets like Germany. Programme sponsorship in other major European markets, as has been analysed earlier in this section, accounts for at least twice the UK proportion⁷⁵. Pressures to liberalise sponsorship rules had been fierce, and the regulator, the ITC, changed its Sponsorship Code in 1997.

⁷⁴ Huw Jones, European Communication Management (ECM), interview in London, February 1997.

⁷⁵ Barrett, M. (1996) *Antenna '96*, 29-28.

II. 5. Conclusions

The five countries studied are at different stages of development in their television systems and advertising expenditure levels, which make the comparative analysis useful. Determinant differences lie in the competitive structures of these markets. The number of channels varies between one Member State and another, and the means of distribution are also at very different stages, but the one common fact is that advertising expenditure is still the main source of revenue for television although at different degrees. Trends in display expenditure signal how much revenue could be up for grabs between the different media targeted by advertisers' budgets in search of larger audiences.

Advertising levels are connected to the health of the economy. Television advertising grew in the late eighties in the EU as a result of the deregulation which increased the airtime on offer when Europe was under-advertised. It also profited from a more buoyant economic situation. In the early nineties, when the economic recession hit European economies, advertising suffered a slowdown, and it decreased in 1992-1993. Television advertising also slowed down but it nevertheless grew at a faster pace than both total advertising and the press. Television channels cut their prices to meet the economic crisis and the press was badly hit by this competition. Smaller advertisers could now afford television drawing advertising revenue away especially from the local press and magazines.

This battle is not only between media, but within channels. Deregulation increased airtime supply, but as a result audience shares became fragmented, and for an advertiser, this was starting to become an issue. After several years of competition, audiences tend to level out, but in open, growing markets, buoyant advertising expenditure level constitutes a strong attraction for new entrants to the television system and audiences become fragmented. The

big losers in this game are the mix-funded public broadcasters. In Germany, for example, they have lost both audience and adspend share. Licence fees increased to nearly DM thirty per month, in January 1997. Competition on the television scene forces the pressure to justify the level of licence fees. Public broadcasters that are also financed by advertising revenue are increasingly being accused of unfair competition for this double finance. In France, and in Spain, public broadcasters are still holding a big audience share so their bargaining power in the advertising expenditure market is stronger. One possible reason may be that in those countries the number of channels is still small and therefore each has a larger advertising share of revenue than in countries with many more channels, for example in Germany or the UK. This situation drives public broadcasters to become more commercially oriented in their selling and scheduling practices.

An increased supply of airtime affected advertising expenditure on European television. What happens on the demand side? The analysis on a country basis shows that the way television airtime is sold also affects revenue. France, Italy and Spain, where heavy discounts and bargaining are an integral part of the method by which airtime is sold, are demand-driven. Television channels have responded to diminishing audiences and decreasing advertising revenues by “dumping” their prices. As a result, advertisement clutter occurs. Increasing advertising volumes to high levels by giving airtime away or offering it at very low prices has resulted in lower advertising revenues. Advertisers worry about the effectiveness of their campaigns. In the search for value for money, advertisers and television channels work together to find new ways of commercial communications/revenue such as sponsorship and teleshopping.

The role of regulation in setting a framework for the allocation of advertising expenditure is a key issue. How governments solve the tensions between developing a commercial television sector and, at the same time, preserving public broadcasting is another problem. Single Member States face different powers and interests: Private versus public television, advertisers and their middlemen, the agencies and media buyers, and concerns from the press which fears a loss of advertising expenditure share to commercial television. On the other hand, national restrictions on advertising time allowances are framed by the requirement to implement the TWF Directive. The next chapter deals with the regulatory frameworks in which national and European advertising guidelines are shaped.

CHAPTER III

EUROPEAN AND NATIONAL REGULATORY FRAMEWORKS

III. 1. Introduction

The previous chapter gave a general overview of television advertising in the five major European advertising markets. This chapter will describe the regulatory framework in which they operate, both at the European and at national levels. How these levels interconnect to shape the rules by which television advertising must comply, is the key to understanding the nature of the issues addressed by this thesis. The relationships are complex: They involve first, the relationship between national regulators and commercial interests, then their interdependence with the individual Member States and the overarching regulatory bodies of the European Union (EU). In the first case, commercial interests, appeal to the European framework to settle differences with national regulators. The latter try to retain their powers over their own national television and advertising structures, while maintaining their commitment to the development of competitive conditions in domestic markets. Again, understanding how television advertising is shaped in the EU and, in particular, in the countries studied, depends on the nature of this political commitment and the manner in which it is enforced. Because national economic objectives, advertising practices and cultural policies do not necessarily converge, the interconnection of both regulatory frameworks needs close study.

III. 2. The European regulatory framework in television advertising and sponsorship

III. 2. 1. A historical overview: The Green Paper "Television without Frontiers"

In the mid-eighties, satellite television appeared to be the future way for the transmission of television on a pan-European basis. With the publication of the Commission's Green Paper *Television Without Frontiers* the new concept of pan-European satellite channels came under consideration¹. The deregulatory policies that were pursued by some Member States would lead to the internationalisation of the television market because satellite signals are difficult to stop, and provided an opportunity for the circumvention of national regulations. *Television without Frontiers* took the view that Article 10 of the European Convention on Human Rights (ECHR) extends also to the free flow of advertising but "this enjoys a lesser degree of protection than other ideas, information and opinions"².

Television without Frontiers was a comprehensive document on the state of broadcasting in the European Community in the mid-eighties, and presented the Community Law perspective to the debate over broadcasting. Its main idea was the establishment of a common market for broadcasting and clearly stated harmonisation measures to reach this. The European Commission argued that broadcasting was an economic activity, and therefore under the Commission's power. These channels were regarded as the main agents for the creation of a European audio-visual industry and European-produced programmes that would enhance a common culture. According to Martín, the three basic elements of the Green Paper are the importance given to broadcasting in the construction of a European culture, the clear intention to harmonise national audio-visual laws and regulations, and the acknowledgement of

¹ Commission of the European Communities (1984) Green Paper on the establishment of the Common Market for broadcasting especially by satellite and cable, *Television Without Frontiers*, COM(84) 300 final, Brussels, 14 June 1984.

² Green Paper *Television Without Frontiers*, op.cit., 178.

broadcasting activities as falling under the provisions of Article 59 of the Treaty of Rome³. However, the Commission could not concede a central cultural dimension to broadcasting because it would disqualify it from its scope⁴. The European Commission affirmed that all broadcasts were services, whether financed by licence fee or advertising, regardless of any cultural content. It acknowledged the role of advertising in financing a Single Market in the audio-visual and the pan-European television project was mainly to be financed by advertising. At the same time, it concluded that there was a need for television advertising to be subject to conditions similar to those for programmes:

“The broadcasting of advertisements, where it is permitted, is a direct source of revenue for the broadcasting organisation(...). If, therefore, broadcasting coming from abroad, is not subject to similar conditions as regards quantity, quality and timing to those applicable within the country, but is subject to substantially more liberal principles, this could lead to a deflection of advertising to foreign broadcasting organisation, and thus to a decrease in the income of domestic broadcasting organisation. The terms of their competition with the foreign broadcasting organisation would be distorted by the differences in the law”⁵.

Between the publication of the Green Paper and the adoption of the TWF Directive in 1989 there were discussions between all parties involved over the extent of the harmonisation required to achieve the Single Market in broadcasting⁶.

III. 2. 2. The draft proposals and the Council of Europe Convention on Transfrontier Television

The Commission presented the first proposal for a TWF Directive in 1986 based on Article 57(2) in relation to Article 66 of the Treaty of Rome⁷. Article 57(2) establishes the co-ordination of national rules in order to facilitate the access to activities, in this case,

³ Martín, J. (1995) *La Directiva de televisión: Fundamento jurídico, análisis y transposición al derecho de los estados miembros de la Unión Europea*, Madrid: Colex, 209.

⁴ Collins, R. (1993) *Audiovisual and Broadcasting Policy in the European Community*, London: University of North London Press, 10.

⁵ Green Paper *Television without Frontiers*, op. cit., 178.

⁶ Collins, R. (1993) op. cit., 12.

⁷ Commission of the European Communities (1986) Proposal for a Council Directive on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, COM(86) 146 final, Brussels, 6 June 1986.

transfrontier broadcasting, which in the light of Article 66 applied to services as well. The main objective of the Commission's proposal was the freedom of reception and retransmission of all broadcasting programmes which would comply with the legal dispositions in the country of origin, whether the broadcast was intended to be received in that Member State or in another⁸. Its scope at this time covered both radio and television broadcasts.

The proposal also pursued the development of European programme production and audio-visual enterprises, as well as dispositions regarding advertising and sponsorship, the protection of minors, the right of reply and copyright, though the latter was dropped in a later draft⁹. A second proposal was presented by the Commission in March 1988¹⁰. The quota provisions for programming of European origin were still at sixty per cent, a level regarded by the industry as penalising, but the advertising provisions were well received. The second proposal established a maximum threshold of fifteen per cent a day for advertising, and eighteen per cent per hour. There was some discussion about the broadcast of advertisements concentrated in blocks, but broadcasters were allowed to interrupt programmes with advertising, provided that the integrity of programmes was maintained¹¹. There was a debate between the UK, who wanted the latter regime, and Germany, who pressed to have advertisements grouped in blocks at the end of programmes. In the end a compromise was found, and the UK accepted that "serious" programmes, that is news, current affairs, or documentaries were not to be interrupted more than once every forty five minutes, while Germany accepted more advertising interruptions for less serious programmes¹².

⁸ Article 1, *ibid*.

⁹ Copyright was dropped in the Council of Ministers' Common Position of 13 April 1989, in European Parliament Document C-2/23/89, SEC(89) 595-SYN 52, therefore absent from the Commission's third Amended Proposal of 26 May 1989, COM(89) 247 final.

¹⁰ Commission of the European Communities (1988) Amended proposal for a Directive on broadcasting activities, COM(88) 154 final, Brussels, 21 March 1988.

¹¹ Article 7(2) and (3), *ibid*.

The provisions in the draft TWF Directive reflected the debate which was also going on in other broadcasting policy initiatives taking place at the European level, in particular the Council of Europe (CoE) Convention on Transfrontier Television (Convention)¹³. Especially important were those other European initiatives on the drafting of Chapter IV on television advertising and sponsorship. Within the CoE, advertising and advertising-related activities enjoy the protection of the provisions of the ECHR, which has become an essential factor in broadcasting and television advertising regulation. The CoE, in the Convention's Preamble, considered the freedom of expression as one of the basic principles for the progress of a democratic society, as protected under Article 10 ECHR¹⁴.

The CoE Convention requires that all Parties

“shall ensure freedom of expression and information in accordance with article 10 ECHR and they shall guarantee freedom of reception and shall not restrict retransmission on their territories of programme services which comply with the terms of this Convention”.¹⁵

The CoE, because of its different membership composition and its intergovernmental nature, is more an arena for declaring intentions than a proper regulatory body. The CoE has been actively involved in the media field since 1982, and has expressed more interest in the cultural side of the media than the EU. In 1989, Member States which didn't agree with the European Commission's initiatives, saw in the CoE an alternative with a clear focus on the protection of culture. According to Humphreys, this position could not be more unrealistic as “it presented plenty of opportunities for the liberalisers to obstruct any upward regulatory harmonisation”¹⁶.

¹² Owen, R. and Dynes, M. (1992) “Satellite broadcasting, television technology in the 1980's” in *The Times Guide to the Single European Market*, London:Times Books, 225.

¹³ CoE (1989) Convention on Transfrontier Television, Strasbourg, 5 May 1989.

¹⁴ Preamble, *ibid.*

¹⁵ Article 4, *ibid.*

¹⁶ Humphreys, P. (1996) *Mass Media and Media Policy in Western Europe*, Manchester:Manchester University Press, 263.

In matters governed by the TWF Directive, Article 27(1) of the CoE Convention gives precedence to EU rules:

“In their mutual relations, Parties which are member of the European Economic Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned”.¹⁷

III. 2. 3. The final texts: Similarities and differences

According to Collins, any cultural focus in the draft TWF Directive was lost in the adoption process which followed until a final text was agreed in 1989¹⁸. Under the co-operation procedure, the first draft text had undergone several readings by the European Parliament, a Common Decision and reached a final proposal¹⁹.

The road to the final text of the TWF Directive, in parallel with the CoE Convention, was long and difficult. In the final proposal, radio was left out and the TWF Directive therefore only covered television services²⁰. Programming quotas was the most contested section whereas advertising mainly followed the provisions of the draft CoE Convention. Hirsch and Petersen regard the CoE Convention as the “highest common denominator” but both texts work in parallel. The CoE asked the Council of Ministers to accelerate the work on the TWF Directive, and acknowledged that the Commission would adapt its proposal to the CoE

¹⁷ Article 27(1), CoE (1989) Convention on Transfrontier Television, op. cit.

¹⁸ Collins, R. (1994) op. cit., 67.

¹⁹ COM(86) 146 final, OJ C 179 of 17 July 1986; European Parliament (1987) EP A2-0246/87, 8 December 1987; COM(88) 154 final, OJ C 110 of 24 April 1988; Common Position, 13 April 1989, 5858/89 in EP SEC(89) 595-SYN 52, EP Document A2-159/89, 22 May 1989; COM(89) 247 final, 26 May 1989.

²⁰ Article 2, Common Position adopted by the Council of Ministers on 13 April 1989, 5858/89, in EP Document C2-23/89, SEC(89) 595-SYN 52.

Convention²¹. Finally, the CoE Convention was adopted on 5 May 1989 and the TWF Directive was agreed on 3 October 1989²².

Chapter III of the CoE Convention is dedicated to advertising in general. Articles 11 to 16 deal with advertising, whereas Articles 17 and 18 deal with sponsorship. Apart from the principles on the protection of children, the ban on misleading advertising and the safeguard of the broadcasters' independence in editorial content, the CoE Convention stipulates the limits for advertising airtime at fifteen per cent of the daily transmission time, increased to twenty per cent to include direct offers to the public. In any case, spot advertising must not exceed fifteen per cent. It also sets an hourly limit of twenty per cent, and a maximum of one hour a day for direct offers to the public²³. The TWF Directive adopted the same limits. The European Parliament, in its first reading of the TWF Directive proposal, had wanted to introduce an hourly limit of eighteen per cent for advertising, an amendment adopted by the Commission in its second proposal, but it was finally rejected by the Council of Ministers in its Common Position²⁴. The CoE Convention set out rules on the number of breaks for different programme categories, and banned surreptitious and clandestine advertising, advertising for tobacco and medicines and medical treatments available only under prescription. It prohibited persons regularly presenting news and current affairs programmes from featuring visually or orally in advertising a provision that is absent from the TWF Directive²⁵. The CoE Convention also set out some content rules about alcohol advertising. On sponsorship, it tried to protect the separation of editorial content and advertising content within programmes, and banned sponsorship of news and current affairs programmes. The prohibitions on tobacco products and

²¹ Council of Ministers (1989) Common Position adopted on 13 April 1989, 5858/89, 3.

²² CoE (1989) Convention on Transfrontier Television, *op. cit.*; Council Directive 552/89/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting services, OJ L 298 of 17 October 1989.

²³ Article 12, CoE(1989) Convention on Transfrontier Television, *op. cit.*

²⁴ Article 14, COM(88) 154 final, 21 March 1988; Article 18, Common Position of 13 April 1989, *op. cit.*

medicines also applied to sponsorship²⁶. The phrase “current affairs programmes” is commonly understood as magazines strictly devoted to current events, or news with a political content, but it does not find a definition in either text²⁷.

Although the European Commission had to adapt the proposed TWF Directive to the CoE Convention, the texts were by no means identical. They are very similar in the principle of country of origin for the control and applicable law, and the provisions on advertising, sponsorship and right of reply²⁸.

One of the main differences lies in the criteria for determining which is the “country of origin”, or which country has jurisdiction over the broadcaster. The CoE Convention’s criterion is of a technical nature, that is the transmitting country understood as the country in which the broadcast service is uplinked. The TWF Directive does not define how to qualify for jurisdiction²⁹. In 1989, the general understanding was that “there should be no major disparities in their (both texts) practical application”³⁰. The expectation could not have been more wrong, for many problems did indeed occur, precisely because the TWF Directive did not provide for exact criteria to determine jurisdiction. This issue will be analysed later in this chapter.

Another difference was that Article 16(2b) of the CoE Convention limits advertising directed specifically at a single Party, in order to avoid distortions in competition, unless the Parties

²⁵ Article 13(4), CoE (1989) Convention on Transfrontier Television, op.cit.

²⁶ Articles 15, 17 and 18, COM(88) 154 final, 21 March 1988.

²⁷ EBU (1990) “Commentary on Television Without Frontiers Directive and European Convention on Transfrontier Television, *EBU Review, Programmes, Administration, Law*, Vol. XLI, N°4, July, 13.

²⁸ Schwartz, I. (1990) “*La liberté d’expression (Art. 10 CEDH) et la libre prestation des services (Art. 59 Traité CEE) dans le domaine de la radiodiffusion télévisuelle*” in *Transfrontier Television in Europe: The Human Rights Dimension*, Cassese, A. and Clapham, A. (eds.), Baden-Baden:Nomos Verlag, 171.

²⁹ Article 5(2), CoE (1989) Convention on Transfrontier Television, op. cit.; Article 2(1), Council Directive 89/552/EEC, op. cit.

³⁰ EBU (1990) op.cit., 8.

concerned have concluded bilateral or multilateral agreements in this area³¹. The Treaty of Rome is such an agreement. That limitation would be impossible within the TWF Directive because it would constitute a restriction to the free circulation of advertising broadcasts³². This point was later proved by the ECJ ruling in *Bond van Adverteerders*, in which the ECJ ruled as illegal Dutch legislation designed to prevent cable networks from distributing foreign programmes containing advertising specifically aimed at the Dutch public or subtitled in Dutch when national television stations are not subject to such restrictions. EU governments cannot prevent competition from other EU broadcasters. Even where the measures are justified on grounds of public policy, such restrictions would be discriminatory³³. Other differences lay in their application, for example, that the CoE Convention lacked a Court to resolve disputes, or that European Directives must comply with Community Law.

III. 2. 4. The compromise

The areas regulated by the TWF Directive were programme quotas, advertising and sponsorship, the protection of minors, and the right of reply. The right to refuse re-transmission of a transnational channel was the issue that the TWF Directive helped overcome. Collins sees the final contents of the TWF Directive as a compromise within the European institutions between the “rival goals and interests of liberals and *dirigistes*, culturalists and economists” where the liberal policy goals were reflected in those provisions laying down the regulatory conditions for a Single Market in television³⁴. The dilemma that the Commission faced was that in order to safeguard public general interests from commercial interests in the television field, a restriction of advertising content and breaks was implied, affecting the economics of television. Issues of copyright and whether radio was under the scope of the TWF Directive were dropped

³¹ Article 16(2b), CoE Convention on Transfrontier Television, op.cit.

³² Schwartz, I. (1990) op. cit., 172.

³³ ECJ, Judgement of 26 April 1988 in Case 352/85 *Bond van Adverteerders v The Netherlands*, 1988 ECR 2085.

in the later draft. In each case, as Hirsch and Petersen also point out, national interests diverged and compromises had to be found³⁵.

Sue Eustace of ITVA suggested that, at the moment of the discussions around the adoption of the TWF Directive, the major European commercial lobby groups were pushed mainly by ITV in the UK and CLT in Luxembourg, two of the major European television companies at that time. Meanwhile the other main European commercial television concern, the Italian Fininvest, seemed not to be worried about European politics, and not to be interested in the implications of the TWF Directive debates for their own national media policies. It was later, when the dialogue between commercial television and governments became more difficult that commercial broadcasters turned to the European forum as a saviour, as for example in Italy. In countries like the UK, where the communication between the commercial side and government was fluid, there was much scepticism about the potential benefits of European television regulation³⁶.

In Spain, private television was introduced at the end of 1989, and as in Italy, both the government and the commercial television were more interested in national media policies than they were in European requirements. In Germany, the Western *Länder* objected to the European forum as the proper one for the discussion of broadcasting, since it overshadowed their own jurisdiction in broadcasting. The commercial side of the European television industry, had been concerned that European regulation would harm the development of the sector³⁷. In the eyes of the advertising industry, a directive that dealt just with one medium was only justified because transfrontier broadcasting might have been restricted by some Member States merely on the grounds that it contained different, usually more liberal, advertisements than were allowed

³⁴ Collins, R. (1994) op. cit., 69.

³⁵ Hirsch, M. and Petersen, V. G. (1992) "Regulation of Media at the European Level", in *Dynamics of Media Politics* Siune and Truetzschler (eds.), London:Sage, 43.

³⁶ Sue Eustace, Head of European Affairs, ITVA, interview in London, August 1995.

domestically. The line of argument was that television should cross frontiers as freely as the press³⁸.

In the end, the TWF Directive “represented a classic example of the EC 1992 strategy of reliance largely on the essentially deregulatory principle of mutual recognition, rather than a re-regulatory harmonisation”³⁹. The agreement for Chapter IV arrived finally when Member States recognised that the free flow of advertising conformed with the principle of free movement of goods and services. They had to allow advertising to flow and to be broadcast if there was to be any trans-European audio-visual industry. It can be argued that the TWF Directive effectively established the free flow of transfrontier television for all programmes, including advertising. But despite having introduced a basic set of rules for all advertising through the TWF Directive, and having solved the problem of cross-border television, there are restrictions to advertising on specific health grounds, such as tobacco advertising and alcohol, pharmaceuticals, food advertising, and on children’s advertising.

III. 2. 5. The TWF Directive

The scope of the TWF Directive covers all television programmes, national and transfrontier within the EU. Article 2(3) excludes from the scope of the TWF Directive those broadcasts not intended exclusively for reception in states other than Member States, and those which are not received in one or more Member States⁴⁰. There are exceptions: First, television programmes directed at third countries; second, Articles 4 to 9 on programming quotas do not apply to local television channels which do not belong to a national network; third, Member States can, if they wish, lay down stricter rules for the provisions in Articles 11 and 18, relative to the insertion

³⁷ Humphreys, P. (1996) *op. cit.*, 268.

³⁸ Stanbrook, L. (1992) “Advertising in the New Europe”, Briefings on advertising, The Advertising Association, London.

³⁹ Humphreys, P. (1996) *op. cit.*, 276.

and maximum duration of television advertising. This exception only applies for channels broadcasting exclusively within national territory.

In Article 1 paragraphs b, c and d, the TWF Directive defines the three types of financial arrangements between commercial interests and television broadcasters: namely television advertising, programme sponsorship and surreptitious advertising. It does not include a proper definition for a fourth arrangement, direct offers to the public. However, this is taken into account in Article 18 for the purposes of establishing limits.

Chapter III regulates the promotion of distribution and the production of television programmes. Articles 4 to 6 contain specific provisions for European content and European-origin production. Article 7 gives protection to the film exhibition sector by laying down specific times for film release to television screens. Articles 8 and 9 establish restrictions on the provisions on European content for language policy reasons, and if local broadcasts do not form part of a national network, the entire chapter does not apply.

The provisions governing advertisements are included in Chapter IV on television advertising and sponsorship. The provisions are divided into rules concerning advertising programming, set out in Articles 10, 11, 18, 19 and 20, and rules regarding advertising content, set out in Articles 12, 13, 14, 15, and 16. The TWF Directive also includes certain rules on the content and form of sponsorship in Article 17. Articles 19 to 21 establish the scope for the provisions in Chapter IV.

On the transmission of advertisements, Article 10 and 11 state that advertising shall occur in natural breaks in the programme, and feature films and television movies can only be interrupted if they last forty five minutes or longer. Other programmes can only have

⁴⁰ Article 2, Council Directive 89/552/EEC, *op. cit.*

interruptions once every twenty minutes. Advertising must not interrupt religious services, nor news and current affairs, documentaries and children's or religious programmes less than thirty minutes long. Spot advertising has to be limited to twenty per cent in any one hour and to a total of fifteen per cent of daily transmission time. This limit can be raised by five per cent to include other forms of advertising, such as direct offers to the public, which are also limited to one hour per day. Together with spot advertising, the total advertising time should not exceed twenty per cent of daily transmission time, as specified in Article 18. On the content of advertisements, the TWF Directive imposes a ban on tobacco products and medicines on prescription, and lays down a set of guidelines for alcoholic drinks⁴¹. Advertising shall not cause moral or physical detriment to minors, and Article 16 sets some guidelines on how to portray and treat minors in advertisements, so as not to exploit their inexperience or credulity⁴². Programme sponsors should not be allowed to influence the content of the programme, and are not allowed to sponsor news and/or current affairs programmes. Sponsors have to be clearly identified at the beginning and/or the end of the programme and manufacturers mainly involved in activities banned from advertising cannot sponsor programmes⁴³.

Articles 19 allows Member States to lay down stricter rules for programming time and insertion of advertising for broadcasters under their jurisdiction, on public interest grounds. Article 20 gives Member States the option to set different rules, not necessarily stricter, for local television broadcasts. The control of the rules in Chapter IV lies with the Member States, and Article 21 requires that appropriate measures are applied to secure compliance with the provisions in the TWF Directive.

Other areas co-ordinated by the TWF Directive are the protection of minors and the right of reply. Article 22 of the TWF Directive requires that Member States take the appropriate means

⁴¹ Articles 12, 13, 14, and 15, *ibid.*

⁴² Article 16, *ibid.*

to ensure that television broadcasts by broadcasters under their jurisdiction do not include programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence. The article also aims to protect viewers from discrimination on grounds of race, sex, religion or nationality⁴⁴. On the right of reply, the TWF Directive limits this to cases of damage to legitimate interests by assertion of incorrect facts. A right of reply or equivalent remedy should exist for all broadcasters under a Member State's jurisdiction. The Member States must adopt the measures needed to establish the right of reply and must determine the procedures⁴⁵.

The 1989 TWF Directive was to be implemented by 3 October 1991, and Member States had to communicate to the Commission the text of the main provisions of national law which they would adopt in the fields co-ordinated by the TWF Directive⁴⁶. Finally, Article 26 provides that no later than the end of the fifth year after the date of its adoption and every two years thereafter, the Commission must submit to the European Parliament, the Council and the Economic and Social Committee a report on its application, and if necessary, make further proposals to adapt it to developments in the field of television. In accordance, with this the Commission presented a first report on application, which covered the period up to 1994, concluding that it was necessary to review the TWF Directive and put forward a proposal for amendment in 1995. After much discussion within the Community institutions, a revised TWF Directive was adopted on 30 June 1997⁴⁷. The implementation of 1997 TWF Directive is not the subject of the thesis, but the new text opens to further study the scope of the issues raised in the 1989 TWF Directive.

⁴³ Article 17, *ibid.*

⁴⁴ Article 22, *ibid.*

⁴⁵ Article 23, *ibid.*

⁴⁶ Article 25, *ibid.*

⁴⁷ European Parliament and Council Directive 97/36/EC of 30 June 1997, OJ L 202 of 30 July 1997.

III. 2. 6. General issues on the application of the TWF Directive

The TWF Directive states the basis for the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities. The enforcement of the TWF Directive and the systems of control and legal proceedings can differ according to the formal implementation taken by the Member States, whether by law, regulation or administrative action. It relies on the dual principles of “transmitting state jurisdiction” and “mutual recognition”. If a broadcaster established in a Member State is subject to the laws of that State, other members cannot restrict the reception of its broadcasts within their territory, except for the protection of minors. National implementations have resulted in problems in its applicability. Whenever possible, European legislation tries to approximate national rules, trying to lay down the essential requirements which national standards must meet, but as long as the essential conditions are met, Member States must mutually recognise each other’s specifications and standards. The combination of both principles allows different competitive environments in which European broadcasters can develop.

III. 2. 6. 1. Possibility of stricter rules for national broadcasters

The TWF Directive allows Member States to implement stricter rules than those stated in the text. One can see an internal contradiction between the main purpose of the TWF Directive, which is to approximate legislation and remove obstacles to the free circulation of services, and the possibility of establishing stricter rules.

Article 3 of the 1989 TWF Directive states that:

- “1. Member States shall remain free to require television broadcasters under their jurisdiction to lay down more detailed or stricter rules in the areas covered by this Directive.
2. Member States shall, by appropriate means, ensure, within the framework of their legislation, that television broadcasters under their jurisdiction comply with the provisions in this Directive”.

As explained above, Article 19 allows Member States to lay down stricter rules than those regulating advertising programming time to reconcile demand for televised advertising with the public interest. It states that:

“Member States may lay down stricter rules than those in Article 18 for programming time and the procedures for television broadcasting for television broadcasters under their jurisdiction, so as to reconcile demand for televised advertising with the public interest, taking account in particular of:

- (a) the role of television in providing information, education, culture and entertainment;
- (b) the protection of pluralism of information and of the media.”

Both articles are welcomed by commercial interests if they are used to create a level playing field in competition policies at the national level not only to restrict private channels. “Given the very economic position of public and private broadcasters, Member States are obliged to use Articles 3 and 19 of the Directive to guarantee equal conditions to competitors competing in the same market”⁴⁸. That is to say, if they are used, for example, to regulate in a stricter way the manner in which public broadcasters are financed both by public funds and advertising. The argument is that these public broadcasters benefit from a dual source of income, and thereby create distortions in the television advertising market. In other cases, the regulator wants to help the development of a certain sector, such as cable and satellite, thus accepting for these cases the maximum limits stated by the TWF Directive. The counterpart of this debate is the concession that the TWF Directive makes for local broadcasters in Article 20, as seen above.

⁴⁸ ACT (1995) “Comments and position on the proposals for a revision of the *Television without Frontiers* Directive, Part II: Comments and Proposals”, 17 February 1995, 3.

The ECJ judgement in *Leclerc-Siplec* clarified the relationship between Articles 3, 19 and 20 of the TWF Directive⁴⁹. It concerned the power of Member States to restrict product categories from advertising on television. The ECJ ruled that Member States were to remain free, under Article 3(1), to lay down more detailed or stricter rules for television broadcasters under their jurisdiction in the areas covered by the TWF Directive but they had to affect domestic and foreign products in the same manner. The freedom to lay down more detailed rules is not restricted to the circumstances in Articles 19 and 20. The ECJ, on this occasion, confirmed the legal ban imposed by French authorities on television advertising by the distribution sector. This ruling gives the Member States a broad margin to assess interests which would justify stricter rules than those in the TWF Directive⁵⁰.

III. 2. 6. 2. Freedom of reception and the principle of country of origin

In order to guarantee the establishment of a Single Market, Article 2 of the TWF Directive establishes the freedoms of broadcast and of reception. The criterion to follow is the country of origin. Article 2(1) states that each Member State shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction, or through a frequency or satellite capacity, or up-link situated in that Member State, comply with the law of that Member State.

Article 2(2) of the TWF Directive ensures freedom of reception for all television broadcasts, and Member States shall not restrict retransmission on their territory of television broadcasts from another Member State for reasons which fall within the areas co-ordinated by the TWF Directive. Only in certain cases could Member States stop retransmissions: in cases of severe infringements of Article 22 on the protection of minors; when during the previous twelve

⁴⁹ ECJ, Judgement of 9 February 1995 in Case C-412/93 *Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité*, 1995 (1) ECR 0179.

months, the broadcaster has infringed the same provision on at least two occasions; when the Member State concerned has notified the broadcaster and the Commission in writing of the infringement and its intention to restrict the service; and when consultations between the transmitting State and the Commission have not produced an amicable settlement within fifteen days of notification. The Commission must ensure that the measures taken are compatible with Community Law. If they are not, the Commission may ask the Member State to end the prohibition of transmission. Only on the grounds of public health and the protection of minors could a transfrontier broadcaster, otherwise complying with the regulation in its country of origin, have retransmission suspended. Since the adoption of the TWF Directive, only the UK has felt it necessary to have recourse three times to this procedure⁵¹.

This point brings the analysis into the core of the basic principle in the TWF Directive, the principle of country of origin in the disputes about jurisdiction and control. The combination of public health policies with the Single Market aims to give the full framework in which the TWF Directive has to develop.

⁵⁰ Commission of the European Communities (1997) Second report on the application of Directive 89/552/EEC, COM(97) 523 final, Brussels, 24 October 1997; Article 19 disappeared in the new Directive 97/36/EC of 30 June 1997, OJ 202 L of 30 July 1997.

⁵¹ *ibid.*, reference to the Red Hot Television case, a channel that broadcast from a satellite up-link first in the Netherlands, then in Denmark, but with certain elements of relevance to its broadcasting activities being situated in the UK. The British authorities decided to intervene to stop broadcasts on their territory. In fact, it came under the jurisdiction of neither country, since the two first countries adopt the establishment criteria, and the UK had focused at that time on the place where the up-link occurs. The other two cases refer to the Rendez-Vous and TV Erotica hard-core pornography up-linked in Sweden, proscribed in 1995 and 1996.

III. 2. 6. 3. Key European Court of Justice rulings concerning jurisdiction

This principle of country of origin also appeared in the CoE Convention⁵². Article 5(1) establishes that each transmitting Party has to ensure by appropriate means that all television services under its jurisdiction comply with the CoE Convention. Article 5(2) defines the meaning of a “transmitting Party” in the case of satellite transmissions as:

- “b. in the case of satellite transmissions:
 - i. the Party in which the satellite up-link is situated;
 - ii. the Party which grants the use of the frequency or a satellite capacity when the up-link is situated in a State which is not a Party to this Convention;
 - iii. the Party in which the broadcaster has its seat when responsibility under (i) and (ii) is not established.”

In contrast, the TWF Directive demands the control of broadcasts by a single Member State. In fact this principle could allow the TWF Directive to reach its objective of free flow of transfrontier programming. That is how the commercial sector sees it, and the industry is keen to maintain the status of the principle. Rosemary Stock of MTV believes that the country of origin principle, is at the core of MTV’s success as a truly pan-European channel⁵³. The Association of Commercial Television affirmed that the country of origin rule is a *conditio sine qua non* for the creation of a Single Market in television, it is the “single most important prerequisite for the free circulation of television services across Europe’s borders”⁵⁴. The principle also affects the circulation of television advertising by establishing the appropriate legislation with which advertisements and commercial broadcasters must comply.

It has not been an easy task to identify the country of origin for broadcasts. Because Article 2(1) provides two linking factors, national interpretations have been diverse. The Commission takes the view that the place of establishment is the correct criterion. The first TWF Directive

⁵² Article 4, CoE Convention on Transfrontier Television, op. cit.

⁵³ Rosemary Stock, Government and Regulatory Affairs Manager, MTV Europe, interview in London, October 1995.

⁵⁴ ACT (1995) op. cit., 2.

proposal took place of establishment as the connecting factor⁵⁵. The Commission explains that the later wording revision to include jurisdiction rather than establishment was made to solve a specific problem arising in Germany, where Allied Forces radio broadcasting (as the first proposal covered radio) originated and was established in Germany but was not under Germany's jurisdiction⁵⁶

The ECJ was approached on several occasions about the issue. These cases embody two separate issues on the implementation of the general principle of country of origin. One is how to establish which country has jurisdiction. The other is the extent to which Member States can or cannot exert a secondary control over broadcasts which comply to another Member State's regulations, because they fall into their jurisdiction.

In *Commission v United Kingdom*, the ECJ examined the UK's interpretation of the term "jurisdiction" used in Article 2(1) of the 1989 TWF Directive. The Commission, supported by the French Republic, took the UK before the ECJ for not implementing correctly the establishment criterion in the TWF Directive, to determine jurisdiction. The 1989 TWF Directive does not contain an express definition of the term "jurisdiction". Article 2(1) refers to broadcasters as being under the jurisdiction of a Member State without referring to the place from which they transmitted their broadcasts. Based on the definition in the CoE Convention, which uses the transmission criterion to determine the country of origin, the UK interpreted the TWF Directive differently from other Member States by deciding that any channel uplinking to a satellite from its territory fell under its licensing regime⁵⁷. All other Member States considered

⁵⁵ Recital 43, Commission of the European Communities (1986) Explanatory Report to the Proposal for a Council Directive on broadcasting, COM(86) 146 final, Brussels, 6 June 1986. Article 1 refers to transmitting country, but the Explanatory Report qualifies that it means the country in which the broadcasting enterprise is established.

⁵⁶ Commission of the European Communities (1995) Report on application of Directive 552/89/EEC and Proposal for a European Parliament and Council Directive amending 552/89/EEC, COM(95) 86 final, 95/0074/(COD), Brussels, 31 May 1995, 17.

⁵⁷ Article 5(2), CoE Convention on Transfrontier Television, op. cit.

that a channel should be regulated by the country in which it is established. But the ECJ rejected the argument used by the UK, and ruled that by adopting that criteria, the UK had failed to correctly implement the TWF Directive⁵⁸.

In a second case, *Commission v Belgium*, the ECJ held that only the Member State from which television broadcasts emanate can control the application of the law applying to such broadcasts and to ensure compliance with the TWF Directive. The receiving Member State is not authorised to exercise its control in that case⁵⁹. The issue at stake was the right of the receiving State to block transmission for a reason not covered by Article 22 of the TWF Directive on the protection of minors. The ECJ held that Belgium was wrong to do so. The decision also applied to France, where the regulator, the CSA, had also refused the cable diffusion of TNT/The Cartoon Channel, television broadcasters based in the UK.

These programmes were the subject of a third ECJ case, *Paul Denuit*⁶⁰. The Belgian government prohibited the distribution on cable networks of TNT/Cartoon Network, which were broadcast from the UK, on the grounds that they did not meet the quota standards of the TWF Directive on European works⁶¹. The two channels had licences issued by the British regulatory authority, the ITC under the special scheme set up by the Broadcasting Act 1990 for “non-domestic” satellite television channels which contained provisions about the broadcasting of European works that were less strict than the rules laid down for terrestrial and domestic satellite channels⁶². After the ECJ judgement in *Commission v United Kingdom*, the situation was finally amended in the UK. As a result, the country of origin in this case was the UK. The Belgian national court also wanted to determine to what extent the application of the country of

⁵⁸ ECJ, Judgement of 10 September 1996 in Case C-222/94, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, 1996 ECR I-4058.

⁵⁹ ECJ, Judgement of 10 September 1996 in Case C-11/95, *Commission v Kingdom of Belgium*, 1996 ECR I-4153.

⁶⁰ ECJ, Judgement of 29 May 1997 in Case C-14/96, *Etat Belge v Paul Denuit*, 1997 ECR I-2785.

⁶¹ Articles 4 and 5, Council Directive 552/89/EEC of 3 October 1989.

origin principle depended on the proportion of programmes of non-Community origin broadcast by channels. The ECJ found that the origin of programmes or their conformity with Articles 4 and 5 of the 1989 TWF Directive do not affect the issue of a Member State's jurisdiction. The case raised further questions on the main criteria for determining which State has jurisdiction over a television broadcaster.

Finally, a fourth case, *VT4 v Vlaamse Gemeenschap* was brought before the ECJ by the Belgian *Raad van State* or Council of State for a preliminary ruling, once again on the interpretation of Article 2 of the 1989 TWF Directive⁶³. The ECJ had to define the criteria for deciding on jurisdiction over a television broadcaster. The case concerned a decree refusing VT4, a broadcaster established in the UK, access to the Flemish cable distribution network. However, VT4 had installations in the Flemish region, and its programmes focused on the Flemish public. The Belgian authorities considered VT4 to be a Flemish broadcaster, but one trying to circumvent national provisions by establishing itself in the UK⁶⁴. This case had been brought before the ECJ before its ruling in *Commission v United Kingdom*. Once again, the ECJ ruled that a television broadcaster comes under the jurisdiction of the Member State in which it is established. If the broadcaster is established in more than one Member State, the one having jurisdiction over it is the one in whose territory the broadcaster has the centre of its activities, where the decisions concerning programme policy are taken and where the programmes are finally put together.

⁶² Section 43, Broadcasting Act 1990.

⁶³ ECJ, Judgement of 5 June 1997 in Case C-56/96, *VT4 v Vlaamse Gemeenschap*, 1997 ECR I-3143.

⁶⁴ "European Court of Justice Judgements on the interpretation of the "Television without Frontiers" Directive" *IRIS*, June 1997, 4.

A fifth case by the ECJ, *Konsumentombudsmannen v De Agostini*, brought about the issue of a country imposing secondary controls on a broadcaster under the jurisdiction of another Member State on the grounds of misleading advertising⁶⁵. This case had been preceded by a ruling of the EFTA Court on a similar problem⁶⁶. The EFTA Court had addressed the relationship between the TWF Directive and the Misleading Advertising Directive⁶⁷. The latter had been adopted on the principle of minimum standards but not mutual recognition. The EFTA Court stated that, in cases of transfrontier broadcasting, a receiving Member State may be in a better position than the transmitting one to decide whether or not advertising directed at an audience within its territory is misleading⁶⁸. Taking this ruling into account, the ECJ considered that if the receiving Member State could not adopt measures against an advertiser on the grounds of misleading advertising, the Misleading Advertising Directive would find itself without substance. That Directive stated that Member States must provide adequate and effective means for the control of misleading advertising⁶⁹. The ECJ therefore ruled that the TWF Directive does not preclude a Member State from taking measures against television advertising broadcast from another Member State, so as to protect consumers against misleading advertising. The measures must not prevent the retransmission, as such, in its territory of television broadcasts coming from another Member State.

This ruling raises questions on the workability of the concept of jurisdiction, since the interpretation of what constitutes misleading advertising is left to the single Member States' discretion, and could eventually be a tool to effectively prevent the free flow of advertising within the European Union. The ECJ ruling is crucial in that the protection of consumers is an

⁶⁵ ECJ, Judgement of the Court of 9 July 1997 in Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v De Agostini*, JO C 252 of 16 August 1997, 12.

⁶⁶ Court of the European Free Trade Association, Judgement of 16 June 1995 in Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia and Lego Norge*, Report of the EFTA Court, 1 January 1994-30 June 1995, 113.

⁶⁷ Council Directive 84/450/EEC of 10 September 1984, OJ 1984 L 250 of 19 September 1984.

⁶⁸ Pullen, M. (1996) "TV Advertising within the EU and EFTA", *Entertainment Law Review*, comment section, Vol. 1, 35.

overriding requirement for the public interest, covering advertising and television broadcasts. This principle, may under certain circumstances, justify obstacles to the free movement of goods or restrictions on the freedom to provide services. The question raised is how is the balance reached between a measure which infringes the freedom to transmit, to promote goods and to provide services, and a measure which is necessary for the protection of consumers. According to McGarry, “the Court has somewhat restricted the operation of the TWF Directive, in the sense that its advertising provisions conflict with the requirement to attain a high standard of consumer protection”⁷⁰. The ruling also reflects the conflict of policy aims within the European forum, especially between policies aiming to protect consumers, those to promote the Single Market and those to enhance a European audio-visual industry.

III. 2. 7. Other European texts related to television advertising and sponsorship

Most of these initiatives will affect television advertising in the coming years and have helped shape the issues raised by the implementation of the TWF Directive. They reflect the issues at stake in the late 1990’s within the European institutions and Member States in the field of advertising and commercial communications.

III. 2. 7. 1. Food labelling

The first directive dealing with advertising is Council Directive 79/112/EEC of 18 December 1978 on the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, amended in 1984⁷¹. The scope of harmonisation is limited given that the text applies only to national rules on labelling and presentation, and in spite of its title, not to provisions to

⁶⁹ Article 4(1), Council Directive 84/450/EEC of 10 September 1984 on Misleading Advertising.

⁷⁰ McGarry, P. (1997) “European Court of Justice, Consumer protection and television advertising” *Commercial Communications*, October, Issue 9, 25.

commercial communications⁷². The primary purpose of this Directive is to use labelling to instruct and protect consumers. It was amended by Council Directive 89/395/EEC of 14 July 1989 which subject certain information concerning food products to new regulations. Other references to food advertising are in the Council Directive on infant formulae, which includes a provision on the national rules taken on the advertising of baby foods⁷³.

III. 2. 7. 2. Misleading and comparative advertising

The general framework in advertising at the European Union level was set in 1984 by Council Directive 84/450/EEC of 10 September 1984 relative to the approximation of dispositions by law, regulation or administrative action of the Member States for Misleading Advertising⁷⁴. In 1975, when the European Commission drew up a preliminary programme on consumer protection, two basic rights for consumers were identified which dealt with advertising. First, the right to the consumer's economic interests protection led to the principle that advertising should not mislead the consumer. Second, the right to information was established as the general principle for advertising. The Misleading Advertising Directive was passed because of the increased importance that Member States place on advertising and its effects on consumers. It sets minimum requirements only. Member States are free to choose the means to prevent misleading advertising. They are obliged to ensure adequate and effective means for its control. Unfair advertising is still blocked at Council level, but the Commission considered the need to harmonise rules on comparative advertising as an absolute necessity⁷⁵. Comparative advertising is the responsibility of DGXXIV or Consumer Policy Directorate. DGXV, which normally harmonises rules on advertising, was also involved in the work with DGXXIV and European

⁷¹ Council Directive 79/112/EEC of 18 December 1978 on the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ L 33 of 8 February 1979.

⁷² Article 15, *ibid.*

⁷³ Article 7 and 8, Council Directive 91/321/EEC of 14 May 1991, OJ L 175 of 4 July 1991.

⁷⁴ Council Directive 84/450 of 10 September 1984, OJ L 250 of 19 September 1984.

Parliament to amend the Directive on Misleading Advertising so as to include comparative advertising⁷⁶. The new Directive allows the use of pertinent comparisons in advertising. It means that countries like France or Germany will have to allow comparative advertising, but it will not much affect the UK, as such practice is already allowed.

This Directive poses a problem in enabling the country of origin principle to work in the field of audio-visual advertising, as explained above. It was adopted before the Single European Act agreement, so it does not work under the country of origin principle. Single Member States could prevent television broadcasts carrying misleading advertisements from being distributed in their territories, with the aim of viewer protection. There are no uniform standards concerning the concept of misleading advertising among Member States. In spite of the Directive, the differences that exist remain substantial⁷⁷.

III. 2. 7. 3. Advertising of tobacco products

Following reports concerning health warnings about the dangers of smoking, many European Union governments have prevented tobacco from being advertised through certain media. There are many vested interests around tobacco products, since they are a major source of taxation. The TWF Directive banned all television advertising and sponsorship of tobacco products making tobacco the most restricted of all legally sold products in terms of advertising.

⁷⁵ "Comparative advertising and the consumer", *Commercial Communications*, August 1997, Issue 8, 15.

⁷⁶ European Parliament and Council Directive 97/55/EC of 6 October 1997, amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ L 290 of 23 October 1997, 18.

⁷⁷ Schotthöfer, P. (1992) "European Community" in *Advertising Law in Europe and in North America*, Maxeimer and Schotthöfer (eds.), op. cit., 92.

The policy objective at the European Union level is to harmonise fully the rules on tobacco advertising, since in the Commission's opinion,

“the harmonisation of authorised advertising only would not resolve the problems arising from the divergence of national legislation and would not guarantee the smooth operation of the internal market, while taking into account the need for a high level of public health”.⁷⁸

Lionel Stanbrook, of the Advertising Association in the UK, affirmed that it is ironic that in the dispute about advertising restrictions and freedom of speech, legislators often only seek to ban the advertising of products and not the products themselves. In 1991, the European Community was subsidising tobacco producers, while pressing for a ban on tobacco advertising, already banned from television since the TWF Directive⁷⁹.

In May 1991, an Amended Proposal for a Council Directive on advertising for tobacco products proposed a near total ban on all tobacco advertising. Finally, the Commission drew up a third amended proposal for a Directive in April 1992⁸⁰. It would ban all forms of advertisements for tobacco products, with the exception of certain types of advertising at the point of sale when specifically allowed by national governments. The proposal, which has been discussed on nine separate occasions at Council of Ministers level had been blocked by a minority of Member States, including the UK and Germany⁸¹. At the time of writing, the proposal is currently under discussion in the Council of Ministers for a Common Position⁸².

Much discussion has arisen lately in relation to tobacco sponsorship at the national level. For example, the UK Labour government appeared to have moved away from the full-scale ban

⁷⁸ Commission of the European Communities, “Policies, Public Health-Cancer, Advertising of Tobacco Products” in <http://europa.eu.int/comm/sg/scadplus/leg/en/cha/c11509.htm>, 14 January 1998.

⁷⁹ Stanbrook, L. (1992) “Advertising in the New Europe”, Briefings on Advertising, The Advertising Association, London.

⁸⁰ Modified proposal, presented by the Commission on 20 April 1992 COM(92) 196 final SYN 0194, OJ C 129 of 21 May 1992, 5; European Parliament Opinion, Second Reading, OJ C 67 of 16 March 1992; Economic and Social Committee opinion, OJ C 313 of 30 November 1992.

⁸¹ European Commission, *Tobacco advertising*, Memo 95/159, 28 November 1995, London.

on sponsorship which had been originally proposed, to a series of transitional measures to phase out tobacco over a number of years. It seems that with UK European Union presidency in 1998 tobacco advertising will be one of the policy topics under discussion in the European Union⁸³.

III. 2. 7. 4. Advertising of medicines

The advertising of over the counter (OTC) products, or products that can be sold without prescription, is a heavily regulated field. The advertising of pharmaceutical products is controlled by the terms of the product licence which defines the indications, who can take the product and who cannot. National provisions for the advertising of OTC products are diverse. Among the single Member States, some ban OTC products, such as Belgium and Denmark, others require pre-notification for OTC advertising, such as Italy or France, and others prohibit sales promotion, such as France. National regulations also require advertisements to include an information message at the end of the advertisement. In Spain and Germany the requirements extend the length of the advertisement by twenty five per cent⁸⁴. In the UK, for example, the Proprietary Association of Great Britain has set a strict self-regulatory Code of Standards for the advertising of OTC and food products⁸⁵.

The Directive on the advertising of medicinal products for human use, which covers advertising to health professionals as well to the public, was adopted after twenty three years of debate⁸⁶. It bans the advertising of medicines available on prescription, already banned from television in the TWF Directive, and of those containing psychotropic or narcotic

⁸² Advertising Association, Executive Brief, *Tobacco Advertising*, 12 November 1997.

⁸³ AIG, "Tobacco Advertising", *AIG Notices*, 9 July 1997, 4 and 15 July 1997, 5.

⁸⁴ Commission of the European Communities, Green Paper on Commercial Communications and the Internal Market, COM(96) 192 final, Brussels, 5 May 1996, 27.

⁸⁵ PAGB, Code of Standards of Advertising Practice for Over the Counter Medicines, 1994 edition.

substances⁸⁷. The only significant requirement of the Directive is the need to include the common name of the product if it has only one ingredient and a reminder to read the label. Advertisements must also provide the product's name and what it is for. It also contains general rules on the presentation of the products in advertisements⁸⁸. Finally, advertising for OTC's is subject to the need for market authorisation of the product.

III. 2. 7. 5. Distance selling

The aim of a Directive regulating distance selling is to approximate Member State's laws on contracts between consumers and suppliers solicited and negotiated at a distance. This can affect teleshopping and television advertising which solicits a direct response. The European Parliament, in its first and second reading, attempted to restrict direct response marketing by clauses which enforced the prior consent of the customer before telemarketing and activities that made the cash-with-order transaction virtually impossible. Finally, a Directive was approved in early 1997⁸⁹.

⁸⁶ Council Directive 92/28/EEC of 31 March 1992, on the advertising of medicinal products for human use, OJ L 113 of 30 April 1992.

⁸⁷ Article 3, *ibid.*

⁸⁸ Article 4, *ibid.*

⁸⁹ European Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144 of 4 June 1997.

III. 2. 7. 6. Other European initiatives affecting commercial communications

III. 2. 7. 6. a. Council of Europe "Mass Media Files N°9"

Several initiatives at the European level refer to other forms of non-traditional advertising. The CoE report on programme sponsorship and new forms of commercial promotion on television, *Mass Media Files N°9*, is a document which has proved to be influential for national regulations for sponsorship. It tried to cover the rapidly developing new forms of commercial communications as an additional means of financing television services⁹⁰. Although sponsorship was covered by the CoE Convention, there was a need to identify which activities would qualify as sponsorship, and other practices where the borderline with advertising was difficult to draw.

III. 2. 7. 6. b. Green Paper on Commercial Communications

In November 1992 the Commission decided to review its policy on commercial communications through a Green Paper⁹¹. The objective was to gather opinions from the European Parliament, the Member States and other interested parties on proposals that require any future initiative to be coherent with Community actions or policies, and to develop an approach to evaluate possible problems of compatibility between certain national measures and Community Law. The Green Paper is an initiative from DGXV, which deals with Internal Market matters. The Green Paper covered all forms of advertising, direct marketing, sponsorship, and other measures promoting products and services, and acknowledges the importance of such practices for the creation of the Internal Market. One of its main findings, that is of relevance for this thesis, is that cross-border commercial communications services

⁹⁰ Council of Europe (1991) Programme Sponsorship and New Forms of Commercial Promotion on Television, *Mass Media Files N°9*, Strasbourg, Introduction.

were hindered by differing national regulations. These regulations also create problems for consumers seeking redress against unlawful cross-border communication services.

Although the Green Paper emanated from the Internal Market policy objective, it acknowledges that there are many other policy objectives that could rely on the use or shaping of commercial communications, especially consumer protection or other public interest objectives⁹².

III. 3. The “alternative” rules: European self-regulation bodies for television advertising

The European Advertising Standards Alliance was set up in 1991 and achieved its legal status in 1994. Its aims are to promote and support national self-regulatory systems throughout Europe, to co-ordinate cross-border complaints by Alliance members and provide information on self-regulation in advertising. The initiative tried to provide a counter action to the European Commission’s suggestion that there should be self-regulation in advertising, not only at national, but also at European level⁹³.

The organisation was established to set up a body that could successfully deal with issues affecting advertising in the Single Market, rather than accept detailed legislation. It has developed a system to handle cross-border complaints. If the consumer’s complaint is addressed to a national self-regulatory organisation in the consumer’s home country it is forwarded to the corresponding organisation in the offending country. The Alliance works with all media, and direct mail. Its members include the fifteen EU Member States, and the countries in the European Free Trade Association.

⁹¹ Green Paper on Commercial Communications in the Internal Market, op. cit.

⁹² Margot Fröhlinger (1996) “The Green Paper, commercial communications in the Internal Market”, *Commercial Communications*, Issue 4, September, 15.

The principles on which self-regulation is based are that advertising should be legal, decent, honest and truthful, have a responsibility for the protection of consumers and society, and respect for the rules on unfair advertising. The first self-regulatory code was the International Chamber of Commerce (ICC) Code of Advertising Practice in 1937⁹⁴. Updated regularly, this ICC Code has provided a basis for the codes of practice in most European countries.

⁹³ Geoffrey Draughn, BACC and EASA Director for Special Issues, interview in London, January 1996.

⁹⁴ "ICC International Code of Advertising Practice", in Maxeimer, J. and Schotthöfer, P. (eds.) (1992) *Advertising Law in Europe and North America*, Boston:Kluwer, 365.

III. 4. National regulations and regulatory bodies

III. 4. 1. France

III. 4. 1. 1. The regulatory framework

The transposition of the TWF Directive into the French regulatory system is set within the general framework of audio-visual regulation. The implementation of Chapter IV of the TWF Directive into the French legal system is embodied in the 1986 Broadcasting Law⁹⁵. The principle of freedom of expression underpinned it. The Law has been amended during this decade through a succession of decrees and other laws, specifically the articles regarding advertising and sponsorship⁹⁶. The Evin Law, which bans all advertising of tobacco and alcoholic products, also affects the implementation of Chapter IV⁹⁷.

III. 4. 1. 2. The regulatory authority: the CSA

France has opted to transpose the TWF Directive into its legal system through laws and decrees, but the application and interpretation of these rules lie within an administrative body, the *Conséil Supérieur de l'Audiovisuel* (CSA), that has no proper regulatory powers, but which interprets and controls the rules.

The CSA was set up as an independent organisation in 1989. It is a development of an earlier organisation that was established under the 1982 Broadcasting Law, the *Haute Autorité de la Communication Audiovisuelle*, which then developed into the *Commission Nationale de la*

⁹⁵ Law 82-652 of 29 July 1982 on audio-visual communication, JO of 30 July 1982, 2431; Law 86-1067 on the freedom of communication, JO of 1 October 1986, 11755.

⁹⁶ Decrees 92/279/280/281 of 27 March on advertising and sponsorship, JO of 28 January 1992, 4313. Decree 92/882 of 1 September regulating cable radio and television, amended.

Communication et des Libertés (CNCL) under the 1986 Broadcasting Law. The French government retained responsibility for defining the general rules on both public and private broadcasters, including those for advertising and sponsorship, and the scheduling of films. The CSA was given responsibility to negotiate contracts (*conventions*) with the private channels, in which the general rules for granting the licence were laid down. These contracts also contain the limits allowed for advertising time.

The President, the National Assembly and the Senate appoint the CSA's members. The CSA is under the control of the judiciary, but is not directly under the control of the government. However, because of the appointment system, most of its members belong to the party in power. The CSA can take administrative action, and any appeals against these administrative actions are heard by the *Conséil d'Etat*⁹⁸.

From the two previous regulatory bodies the CSA has inherited its function of the monitoring of transmission and production quotas. Other powers include the supervision of pluralism, as well as the protection of minors, the safeguard of French language and culture. The CSA's responsibilities include the power to appoint the members of the Board of Directors of the public broadcasters, the management of the frequencies, and the power to issue licences for the private sector. The CSA exerts supervision functions to ensure that operators comply with the requirements laid down by law and in their licence contracts *Cahier des Charges*. The CSA can renew these licences without inviting other applicants, for a maximum of five years and on two occasions only⁹⁹.

⁹⁷ Law 91-32 of 10 January 1991 against tobacco and alcoholism, *Loi Evin*, JO of 12 January 1991.

⁹⁸ Robillard, S. (1995) *Television in Europe: Regulatory bodies, status, functions and powers in 35 European countries*, EIM Media Monograph 19, London:Libbey, 66.

⁹⁹ Article 28(1), Law 86-1067 amended by Law 94-88 of 1 February 1994, JO of 2 February 1994.

Law 89-25 of 17 January 1989, by which the CSA was set up, enlarged the powers of the regulatory authority compared those enjoyed by the CNCL¹⁰⁰. The main changes introduced in 1989 were the possibility that the CSA could sign contracts with the licensed broadcasters, the extension of its powers of sanction, and its supervision of Canal Plus. In that law, legislators contemplated the option of empowering the CSA to fix the rules on the content of advertising and sponsorship. However, the Constitutional Court believed that this was unconstitutional because in the last resort the power to regulate lies with the Prime Minister. The delegation of regulatory powers from the Prime Minister to the CSA was considered excessive by the Constitutional Court. This standpoint was later confirmed on 18 February 1994 by a *Conséil d'Etat* ruling highlighting the CSA's lack of regulatory powers¹⁰¹.

According to Hurard, the powers are now well defined: The CSA has the mission to control the content and programming of advertisements, the government fixes rules on the content and programming of these advertisements¹⁰². There are some contested areas, for example, the daily and hourly advertising time limits on private channels that are regulated in the *Cahiers des Charges* signed with the CSA. In the case of teleshopping, however, the CSA is more flexible, and has fixed rules based on a previous CNCL Decision¹⁰³.

The government is responsible for setting the terms and conditions governing the public sector broadcasting service, but the CSA supervises the proper implementation of these requirements, and its opinions are binding¹⁰⁴. In general, decisions taken by the CSA have no regulatory force but are of general significance.

¹⁰⁰ Law 89-25 of 17 January 1989 amending Law 86-1067, JO of 18 January 1989.

¹⁰¹ Robillard, S. (1995) op.cit., 74.

¹⁰² Hurard, F. (1995) "*La publicité audiovisuelle*", in *Droit de l'Audiovisuel*, Gavalda and Piaskowski (eds), Paris:Lamy, 844.

¹⁰³ CSA Decision 90-922 of 11 December 1990, modifying CNCL Decision 88-36 of 4 February, JO 19 January 1991.

The CSA also interprets the Law through letters sent to the broadcasters, in which guidelines on a specific issue are detailed. There is a difficulty in drawing the line between regulation and interpretation of the rules. Until 1991, the CSA controlled advertisements before they were broadcast. Now the control is *a posteriori*. The *Bureau de Vérification de la Publicité* (BVP), a self-regulatory body, exerts control before the advertisements are broadcast. This self-regulation system was well accepted by the industry¹⁰⁵.

The CSA can distinguish between the private and the public sector when applying sanctions and fines¹⁰⁶. Since Law 94-88 of 1 February 1994, the CSA has had the power to impose administrative sanctions on public broadcasters. This enlargement of powers was at the CSA's request in order to treat public and private broadcasters equally. However, there are differences in the sanctions it can impose on either type of broadcaster. Law 94-88 of 1 February 1994 extended these powers again. Since then, the CSA has enjoyed the power to extend administrative sanctions against national public broadcasters, in an attempt to balance the regulatory conditions for private and public broadcasters.

For both the public and the private sector, the sanctions cover a wide range of possibilities, from the *mise en garde* (or a public warning) and its publication in the *Journal Officiel* (Official Journal), to the suspension of the licence in the case of private broadcasters, or the suspension of one part of programming, for all channels, during a month or more. The sanction is usually a financial one. If this procedure is adopted, the *Conséil d'Etat* designates a rapporteur who studies both sides and gives an opinion. However, it is the CSA that imposes the sanction. Fines must not exceed three per cent of the broadcaster's turnover, or five per cent in the case of a repeated offence. The sanction decisions can be appealed before the *Conséil d'Etat*.

¹⁰⁴ Article 48, Law 86-1067 of 30 September 1986.

¹⁰⁵ Hurard, F. (1995) op. cit., 718; see III. 4. 1. 3. of this chapter.

An originality introduced by Law 94-88 of 1 February 1994 is that CSA actions can be contested by professional organisations and the trade unions representative of the audio-visual sector, as well as by the National Council of Regional Languages and Cultures and by family associations¹⁰⁷. For public broadcasters, the CSA has the power to revoke the president. For private broadcasters, the range of sanctions is broader. The CSA can reduce the licence by one year, and it can revoke the licence without the previous *mise en demeure* or formal warning. The CSA has used its powers of sanction on many occasions, notably to fine both public and private broadcasters. On several occasions, its interventions have been prompted by infringements of the advertising and sponsorship provisions, as will be detailed later.

Another form of sanction that has been developed is to use criminal law. The CSA can bring infringements before the criminal courts. The 1986 Broadcasting Law specifies the cases in which this can happen. The most important case is non-compliance with the provisions for the broadcasting of films¹⁰⁸.

Canal Plus was authorised in 1983 to broadcast an encrypted terrestrial channel for twelve years. The concession was accompanied by a *Cahier des Charges*, amended in 1992. During that time the CSA could suggest that the government imposed a sanction, in case Canal Plus did not conform with its contractual obligations. Under this legal framework, the CSA wrote in 1994 to the government proposing a sanction for advertising infractions. In 1995, the CSA renewed its authorisation for five years, and thereafter Canal Plus has been subject to the same provisions as other terrestrial broadcasters.

¹⁰⁶ Law 94-88 of 1 February 1994, JO of 2 February 1994, 1800.

¹⁰⁷ CSA (1996) “*Réglementation et régulation audiovisuelles en France*”, *Les études du CSA*, January, 62.

¹⁰⁸ Article 79, Law 86-1067 of 30 September 1986, amended, on the freedom of communication.

The CSA also grants authorisations for up to thirty years to cable services. Article 25 of Decree 92-882 states that the CSA has to sign a contract with cable/satellite operators for the retransmission of foreign programmes. These systems cannot carry a television channel that lacks the CSA's authorisation¹⁰⁹. In the case of EU Member States, the authorising contract cannot cover the fields co-ordinated in the TWF Directive. In the case of non-EU members, the CSA has extensive powers.

III. 4. 1. 3. Self-regulation in France

The counterpart to the CSA is the BVP which was founded in 1935. As mentioned above, it complements the actions of the CSA and acts like a partner in the control of television advertising. The BVP is a self-regulatory body, an independent professional association which controls the content of advertisements before they are broadcast. The BVP is composed of advertisers, agencies, media and other professional associations. The advertisements are subject to inspection by the BVP which gives its opinion. They may be submitted at the project stage or when the advertisement is finished. Submission in the first instance is optional. If the BVP rejects the advertisement, members agree not to broadcast or publish it.

Consumer associations have demanded that the BVP also exerts control *a posteriori*. The BVP then gives an opinion, and invites the advertiser to justify the content or form of the advertisement, or to modify it in order to comply with existing regulations. If the advertiser refuses to modify the advertisement, the BVP can require media members to stop its insertion. The role of the BVP is consultative. According to Daniel Poinot of the BVP, self-regulation is the key to interpreting rules on a day-to-day basis. It prevents both the media

and the advertisers from paying unnecessary fines and also from sanctions imposed in the last resort by the CSA¹¹⁰.

II. 4. 2. Germany

III. 4. 2. 1. The regulatory framework

In Germany, the basis on which the TWF Directive has been implemented is the freedom of information and expression of opinion, as stated in Article 5 of the 1949 Basic Law¹¹¹. The German federal structure implies that there is a separation of legislative powers between the Federation, *Bund*, and the individual states, *Länder*. The Basic Law stipulates that the sole responsibility for broadcasting rests with the *Länder*, with the exception of radio and television corporations whose main function is to provide foreign countries with information, such as *Deutsche Welle*¹¹². These are established under federal legislation. The *Länder* have responsibility for the media, so German media regulation rests on the individual *Länder*¹¹³. The responsibility derives from the principle of *Länder* sovereignty in cultural matters.

In the 1980's the *Länder* started to grant radio and television licences and decide what programmes could be fed into cable systems. In order to do this, media authorities were created, the *Landesmedienanstalten*, which are under the supervision of the executive power of the *Länder*.

¹⁰⁹ CSA (1996) op. cit., 51, 60, 65.

¹¹⁰ Daniel Poinot, Bureau de Vérification de la Publicité, interview in Paris, July 1996.

¹¹¹ Basic Law for the Federal Republic of Germany, 23 May 1949, amended by the Unification Treaty, 3 October 1990, Bonn: Press and Information Office of the Federal Government.

¹¹² Kleinsteuber, H. (1992) "Federal Republic of Germany", in *The Media in Western Europe*, The European Media Research Group, London: Sage, 85.

The main difficulty with German legislation is in understanding the dual system of regulation which applies to public service broadcasters and to private broadcasters. Germany has tried to solve the situation by applying different principles to regulation. Two forms of regulation are now in place, one for public and the other for private broadcasters. Co-operation between the *Länder* led them to establish a framework for uniform broadcasting legislation, the *Rundfunkstaatsvertrag* (RfStV), following a ruling by the Constitutional Court which had estimated that the new international broadcasting could easily erode the sovereignty of the *Länder*. According to Porter and Hasselbach, the Constitutional Court tried to prevent battles between the *Länder* and the *Bund* in dealing with new cable and satellite channels, and had urged the *Landesmedienanstalten* to “above all harmonise advertising regulation”¹¹⁴. The *Länder* also agreed on the organisation and set up of public channels ARD and ZDF¹¹⁵. This RfStV has subsequently been amended several times, the last time in August 1996¹¹⁶.

III. 4. 2. 3. *The implementation of the 1989 TWF Directive*

The TWF Directive was not mentioned in the 1991 RfStV at any stage, although it was presented to the European Commission as the implementing text. The RfStV did require, as do the new versions, compliance with the provisions of the CoE Convention for channels coming from another Member State, but the CoE Convention gives precedence to EU rules in matters governed by the Convention¹¹⁷.

¹¹³ See Articles 30, 70 and 75 of the Basic Law. Only telecommunications and postal services remain under the *Bund* legislative powers, as stated in Article 73(7). The regulation of technical aspects of broadcasting also remains at the Federal level.

¹¹⁴ Ruling of 4 November 1986 concerning broadcasting law in Lower Saxony (BBerGe 73, 118 ff), quoted in Porter, V. and Hasselbach, S. (1991) *Pluralism, Politics and the Marketplace, The Regulation of German Broadcasting*, London:Routledge, 14.

¹¹⁵ Robillard, S. (1995) *op. cit.*, 77.

¹¹⁶ Third amendment, *Rundfunkstaatsvertrag*, 26 August 1996.

¹¹⁷ Article 16, CoE (1989) Convention on Transfrontier Television, Strasbourg, 5 May 1989.

The 1991 RfStV corroborated the dual-system regulatory system and guaranteed the private broadcasting companies adequate resources through advertising revenues. The public broadcasters were entitled to receive licence fees. The RfStV also contained general rules for advertising and sponsorship, which apply to both public and private broadcasters, but it specified a different and stricter set of rules for public broadcasters¹¹⁸. The new 1996 RfStV did not change provisions for advertising.

In 1993 the *Landesmedienanstalten* adopted a common set of rules regarding advertising and sponsorship, the *Werberichtlinien*, with the aim of further complementing and developing the provisions in the RfStV, and overcoming the differences between them¹¹⁹. They are to be amended in Summer 1998. The *Landesmedienanstalten* are administrative bodies, like the CSA in France or the ITC in the UK. Their rules are therefore administrative rules, not laws or regulations.

The TWF Directive's provisions on the advertising and sponsorship of alcoholic drinks, or the ban on tobacco and medicines on prescription have been implemented in legal texts other than the RfStV, or in self-regulation codes, other than the *Werberichtlinien*¹²⁰. These implementation levels will be studied in Chapter IV on television advertising, and in Chapter V on sponsorship.

¹¹⁸ Articles 6, 7, 26, 27, RfStV, 1991; Articles 7, 8, 44, 45, 46, RfStV, 1996.

¹¹⁹ *Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen, Werberichtlinien*, 8 November 1994.

¹²⁰ *Lebensmittel -und Bedarfsgegenstandesgesetz (LMBG)* of 15 August 1974, BGBl, I-1945; *Gesetz über die Werbung auf dem Gebiete des Heilwesens*, 20 December 1996, BGBl, I-2084; *Deutsche Werberat, Verhaltensregeln über die Werbung für alkoholische Getränke*.

III. 4. 2. 3. Regulatory bodies and control systems

III. 4. 2. 3. a. Public broadcasters

The public sector is organised on the basis of the federal structure of the *Bund* and on the regional competencies of the *Länder*. Each public broadcasting organisation is subject to internal control, which is based on councils formed by representatives of German society, the Broadcasting Councils, *Rundfunkrat* for ARD and the *Fernsehrat* for ZDF. Even though in theory only a few members, are designated by the political parties, the councils are heavily influenced by party interests. The Director-General of the *Landanstalt* or *Intendant*, is appointed by the *Rundfunkrat*, and in charge of developing the programme guidelines and supervises programme editors¹²¹.

ARD is the association of the public broadcasters of all *Länder*. The parliament of each *Land* has enacted a Broadcasting Law or signed a treaty to establish each organisation which is in the ARD. Each one is ruled either by the legal framework of a particular *Land*, or the relevant provisions of the RfStV, in the case of advertising and sponsorship. All regional public corporations contribute according to their size to the first television channel. In addition, they independently organise a regional Third Programme, that offers news and more cultural and educational programme content. This channel does not carry advertising. Under ARD co-ordination, many programmes, such as news, weather, sports and films are fed in centrally¹²². ZDF is organised within the exclusive legal basis of its ZDF-*Staatsvertrag*, an agreement of all *Länder*, and offers a single national programme. In advertising matters, ZDF is only regulated by the RfStV, as is ARD. Both organisations work

¹²¹ Robillard, S. (1995) op. cit., 87.

¹²² Kleinsteuber (1992) op. cit., 86.

within a system of self-regulation, and independent supervision is provided by the *Rundfunkrat* or *Fernsehrat*.

III. 4. 2. 3. b. *Private broadcasters*

The government of each *Land* is responsible for ensuring that each regulatory body, the *Landesmedienanstalt*, exercises its power within the legal framework. They are the sole regulatory bodies for the private sector, granting licences for terrestrial and cable broadcasting. For satellite, a licence granted in one *Land* is automatically recognised in the rest of the *Länder*, but the concept of “*Land* of licence” operates to avoid problems of jurisdiction, but all the authorities participate in the licensing decision through consultation.

The *Landesmedienanstalt* in each *Land* must also ensure that broadcasters granted a licence comply with the legal requirements of that *Land*. The RfStV provides for the Association of *Landesmedienanstalten* to adopt “directives” to comply with rules on the protection of young people, the content of advertising, sponsorship, and the insertion and length of advertising breaks¹²³. The *Werberichtlinien* also envisage supervisory procedures, which are exercised *a posteriori*. If there is a case of breach of the rules the *Landesmedienanstalten* can implement sanctions, in the form of monetary fines. Sanctions are stated in the RfStV. Because the actions of these *Landesmedienanstalten* are administrative acts, the broadcasters can appeal to the Administrative Courts, in the event of a fine.

¹²³ Article 46, RfStV, 26 August 1996

III. 4. 2. 4. Other regulatory bodies: The role of self-regulation

There are two organisations in Germany, which provide guidelines and advice to advertisers, advertising agencies, and the media. The first, founded as early as 1912, is the *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (ZBW) which is responsible for issues of unfair and misleading advertising. The ZBW's aim is the advancement of the interests of trade and of fair competition within the Unfair Competition Act (UWG)¹²⁴. It delivers legal opinions to authorities and courts of justice. In competition disputes it tries to reach an amicable agreement. The ZBW can institute legal proceedings, private applications and bring criminal charges against the unfair competitor. The second is the *Deutsche Werberat* (DW), founded in 1972 by the German Advertising Federation, and responsible for taste and decency. Its purpose is to encourage the development of advertising, to remove deficiencies in advertising, and to act as a point of contact for consumer-related advertising issues. The *Deutsche Werberat* has developed advertising guidelines, in particular the Code for the Advertising of Alcoholic Drinks¹²⁵. There are procedures for the treatment of complaints about advertisements, and anyone can submit a complaint. It does not give legal advice or file court action.

Both organisations see themselves as counterparts to the State regulation which is imposed in Germany, and challenge it. The rationale is that self-regulation is more efficient in dealing with complaints, more cost-effective and faster for both broadcasters and advertisers. They seek to oppose efforts by state institutions to establish restrictions that exceed existing regulation¹²⁶.

¹²⁴ *Gesetz gegen den unlauteren Wettbewerb* (UGW), 27 July 1994, in Nickel, V. (1994) *Werbung in Grenzen*, Bonn:ZAW, 77-84.

¹²⁵ *Verhaltensregeln des Deutschen Werberats über die Werbung für alkoholische Getränke*, in Nickel V. (1994) *Werbung in Grenzen*, Bonn:ZAW, 130.

III. 4. 3. Italy

III. 4. 3. 1. The regulatory framework

The Italian legal framework in broadcasting is a moveable object. The regulation of television, and in particular that of television advertising, has developed in turmoil. The coming and going of political parties, the freedom or legal void in which the sector had developed since the late seventies, has defined the environment in which the implementation of the TWF Directive had to take place.

In Italy, as in Germany, the Constitutional Court has played an important role in developing the regulation of broadcasting. Back in 1960, the Constitutional Court had confirmed the monopoly of the public broadcaster, RAI¹²⁷. A major change occurred in 1974 when the Court found in two rulings that a public monopoly in local television was unconstitutional. At the same time it found that the legislators were reinforcing public monopoly. By declaring that local television channels did not involve any danger to pluralism through the creation of oligopolies, a space was created for a boom in private television. The Court's declaration was based on the greater availability of frequencies at the local level, for private companies. It invited Parliament to regulate the licensing and administration of these frequencies. The Constitutional Court demanded the creation of a mixed system in broadcasting¹²⁸. Parliament did not intervene until Law 10 of 4 February 1985, which redirected the regulation of the system to a later law. This Law was in fact the translation of the Decree-Law of 6 December 1984, or Decree Berlusconi, laying down urgent dispositions for television broadcasting¹²⁹.

¹²⁶ European Advertising Standards Alliance (1995) *Update N°5*, December 1995, 3.

¹²⁷ Judgement 59/1960 GC 1960, 759-783, quoted in Golfari, C. (1994) *Oltre la Mammi*, Milano:Il Sole 24 Ore Libri, 17.

¹²⁸ Judgement 202/1976 of 15.07.1976, GC 1976, 1267-1284, quoted in Martín, P. (1995) *op. cit.*, 432.

¹²⁹ Law 10 of 4 February 1985, Conversion Law of Decree-Law 807 of 6 December 1984, on urgent dispositions on television broadcasting, GU 30 of 5 February 1985.

The transmission of television programmes developed as a network system, similar to that in the USA. Although the simultaneous national broadcast had not been recognised by the Court, in practice local channels had become national, except for news and sports programmes. The result was a mixed system which developed as a duopoly thanks to the high concentration of affiliates to the Berlusconi network.

III. 4. 3. 2. The non-implementation of the 1989 TWF Directive

To some extent, the regulation of broadcasting was determined by the constraint required to translate the TWF Directive into the national legal system. The political environment played an important part. Golfari states that the broadcasting aim to safeguard pluralism in broadcasting was important in the political change of government at the time¹³⁰. These are the origins of the Law 223/90 or the Mammi Law, which partially implements the TWF Directive¹³¹.

The following articles were properly transposed: Article 5 on programme quotas, Article 10(2) (4) on the principle of advertising in blocks, and Article 11(4) on the rules for breaks in news and current affairs, in documentaries and in religious and children's programmes. On the other hand, Articles 8(3) and (4), and Article 26 of the Mammi Law were incompatible with the TWF Directive. Article 8(3) included the possibility of a commercial break in films at the time of a theatrical interval, whereas Article 8(4) opens the possibility of some religious programmes being interrupted by advertising. Article 11(5) of the TWF Directive specifically bans advertising within children's and religious programmes of a programmed duration of less than thirty minutes. Article 26 of the Mammi Law was not compatible with

¹³⁰ Golfari, C. (1994) op. cit., 18.

the TWF Directive in that the quota reserved for broadcasting European programming only applied to films and not to other audio-visual works which could be able to benefit from the European requirement. The measure, according to the Commission was contrary to the spirit of the TWF Directive in promoting European audio-visual work, in particular, a category that includes both feature films and television fiction. The article also breached Article 59 of the Treaty of Rome in that it required that fifty per cent of that broadcasting time used by European works be dedicated to Italian programming. Finally, Article 9(1) lays down the obligation for State administrative organisations and some public organisations to dedicate twenty five per cent of the advertising budget to local broadcasters. The Commission found that this measure was a restriction on foreign broadcasters, which could not offer their airtime to these entities, therefore it was not compatible with Article 59 of the Treaty of Rome¹³².

The sponsorship provisions of Decree 439 of 4 July 1991 did not properly transpose Article 17(1) of the TWF Directive, especially the rules on the sponsor logo and the possibility of referring to the product in the sponsored programme. The Italian government based its response on the views that all principles were well transposed in the letter and spirit of the law¹³³.

Three Decrees emanating from the Minister of Post and Telecommunications complement the Mammi Law and establish more detailed rules on sponsorship and other forms of advertising, as well as the on advertising of tobacco products, alcoholic drinks and the

¹³¹ Law 223 of 6 August 1990 regulating public and private broadcasting, (*Disciplina del sistema radiotelevisivo pubblico e privato*), GU 185 of 9 August 1990.

¹³² Letter from Martin Bangemann, Vice President of the Commission of the European Communities, to Emilio Colombo, of 3 November 1992, Brussels, SG(92) D-1, 92/2168.

¹³³ Letter from Emilio Colombo, Foreign Affairs Minister, to Martin Bangemann, Rome, (no date).

protection of minors¹³⁴. Decree 581 of 9 December 1993 on sponsorship introduced stricter rules for sponsorship than those required in the TWF Directive, opening up a heated debate over this new form of commercial communication, both at the Italian and European levels, forcing the Commission to state clearly its meaning. The ECJ pronounced its judgement in *RTI v Ministero delle Poste e Telecomunicazioni* on the interpretation of certain of the TWF Directive's provisions on sponsorship and direct offers to the public¹³⁵. The ECJ ruled that Article 17(1b) did not prevent sponsor credits at times other than at the beginning and/or the end of the sponsored programme. The sponsors' identification was to be understood as a minimum requirement. It also ruled that the phrase "forms such as direct offers to the public" in Article 18(1) was to be understood as: The airtime allowance of a further five per cent of daily broadcast time on top of the fifteen per cent allowed for television advertising could therefore be used also for other forms of commercial communication that were longer than spot advertisements. This issue will be addressed in detail in Chapters V and VII. It is enough at this point to note that 1994 was the year in which Berlusconi decided to enter the field of politics. There is a coincidence between the political will to limit the financial resources of the major private television actor and the defence of free-market television from inside the market. This defence was articulated, and to some extent protected, by the European regulatory framework for television advertising.

¹³⁴ Decree 439 of 4 July 1991 on television programmes sponsorship, GU N°19 of 24 January 1992; Decree 581 of 9 December 1993 regulating programme sponsorship and offers to the public, GU 8 of 12 January 1994; Decree 25 of 30 November 1991 on the implementation of Articles 13, 14, 15, and 16 of Directive 89/552/EEC on television advertising of tobacco products and alcoholic drinks, and on the protection of minors, GU 4 of 4 July 1992.

¹³⁵ ECJ, Judgement of 9 July 1997 in Joined Cases C-320, 328, 329, 338 and 339/94, *RTI and others v Ministero delle Poste e Telecomunicazioni and Garante per la Radiodiffusione e l'Editoria*, 1996 ECR I-6471.

A third decree was issued by the President regulating the simultaneous retransmission of programmes (*la diretta*)¹³⁶. This Decree also established the procedure for granting national concessions.

III. 4. 3. 3. The supervisory authority and the self-regulation alternative

Broadcasting is under the competence of the Ministry of Post and Telecommunications, which is responsible for licensing. The *Ufficio del Garante per la Radiodiffusione e l'Editoria* (the *Garante*) is an administrative authority, and was created under Article 6 of the Mammi Law¹³⁷. It exerts a supervisory position. It is a monocratic organisation which has several functions, in particular the supervision of advertising and sponsorship rules. The *Garante* also has powers of sanction.

Because the *Garante* has personal powers which cannot be delegated in any way, he is assisted by another organisation, the *consiglio consultativo degli utenti* with consultative functions, which he appoints and organises. The Mammi Law details the *Garante's* supervisory duties and the sanctions that can be applied. In the case of the breach of a legal provision on advertising, the *Garante* can require the channel to explain its actions. Fines can be imposed if the rules are not observed. In serious cases, the public service or private channels can have their licences suspended for up to ten days.

In this environment, the role of self-regulation seems to be important. Both public and private broadcasters have signed self-regulation agreements on the insertion of breaks which involve the major associations of advertisers, agencies, and media buyers. A self-regulatory body with a code of practice, *Istituto dell' Autodisciplina Pubblicitaria* (IAP), gives

¹³⁶ Decree 255 of 27 March 1992, *Regolamento di attuazione della legge 6 agosto 1990 223 sulla disciplina del sistema radiotelevisivo pubblico e privato*, GU 77 of 1 January 1992.

judgements through its own internal jury. The majority of media, agencies and advertisers subscribe to the IAP which is considered to be a valid alternative in times when the legal initiatives considered to be more damaging to the private sector. The IAP has drawn up a code of behaviour in advertising, whose first edition was in 1966¹³⁸.

III. 4. 4. Spain

III. 4. 4. 1. The regulatory framework

Spain, like Germany, has a two-tier legal structure. The State delegates to the regions the power to organise their own public audio-visual sector. Article 147(27a) of the Spanish Constitution of 1978 gives the State the exclusive authority to determine broadcasting standards, and gives the autonomous regions the authority to implement further these standards. The powers of the autonomous regions, *Autonomías*, are subsidiary to those of the State.

Article 128.2 of the Constitution considers television as a fundamental public service under the authority of the State. On this basis, the Law 4/1980 of 10 January 1980 on the Statute of Radio and Television gives the management of the public service to RTVE through the creation of a public organisation, *Televisión Española*¹³⁹. In 1983, Law 46 of 26 December gave the Government the power to regulate the creation of a third television channel, owned by the State, but licensed to the autonomous regions¹⁴⁰. At the time, only two public channels were broadcasting in Spain. In 1987 the Law of Telecommunications was passed, laying

¹³⁷ Robillard, S. (1995) op. cit., 125.

¹³⁸ *Codice dell' Autodisciplina Pubblicitaria Italiana*, 25th edition, 30 March 1997.

¹³⁹ Law 4/1980 of 10 January 1980 of the Statute of Radio and Television, BOE 11 of 12 January 1980.

¹⁴⁰ Law 46/1983 of 26 December 1983 of the Third Channel, BOE 4 of 4 January 1984.

down the technical provisions for both radio and television broadcasting¹⁴¹. Private television arrived five years later with Law 10 of 3 May of 1988 of Private Television after a ruling by the Constitutional Court that private television was a “political decision which could be adopted within the Constitution”¹⁴².

Regarding the provisions for advertising, the Law of Private Television already stated some basic rules on the amount of advertising allowed. The form and content of advertising were regulated by Law 34 of 11 November 1988, General Law on Advertising (GLA)¹⁴³.

III. 4. 4. 2. The late implementation of the 1989 TWF Directive

Spanish legislators took their time in implementing the TWF Directive into this rather cluttered legal framework. Although the date for the final implementation was 3 October 1991, Spain did not implement it until July 1994, with the Law 25/1994 of 12 July¹⁴⁴. The adoption of this Law was preceded by an intense debate between the Socialist Government then in power and the private television operators. As explained before, private television did not arrive until 1990 and then it thrived in a legal void, as far as advertising and sponsorship were concerned. During Autumn 1993, while the Law was being drafted, an intense exchange of letters and opinions took place between the Ministry of Telecommunications and the private operators. The Ministry had issued warnings to *Telecinco* and *Antena 3* for breaching the advertising provisions in the Private Television Law. The Secretary of Communications indicated that the draft needed to reflect “the will for flexibility within the public

¹⁴¹ Law 31/1987 of 18 December 1987 regulating telecommunications (LOT), BOE 303 of 19 December 1987.

¹⁴² Judgement of the Constitutional Court, 12/1982 of 31 March, FJ 6, quoted in Martín, J. (1995), op. cit., 350; Law 10/1988 of 3 May 1988 of Private Television, BOE 108 of 5 May 1988.

¹⁴³ Law 34/1988 of 11 November 1988, General Law on Advertising, BOE 274 of 15 November 1988.

¹⁴⁴ Law 25/1994 of 12 July 1994, Transposition Law, BOE 166 of 13 July 1994.

institutions”, and that the delayed period of adoption for certain provisions would “satisfy your (private operators) concerns”¹⁴⁵.

In the preamble to the Law, the legislator explained why they opted for the Law as an implementation procedure. A single law was considered to be better than modifying all previous laws. The legislator wanted to avoid the issues that had arisen in other Member States, allowing for the partial implementation of the TWF Directive¹⁴⁶. The Law is controversial also because it does not make a distinction between the public and the private sectors in its provisions for advertising and sponsorship. The State Law has delegated regulatory powers to the Autonomous governments over their own broadcasting systems.

Later regulatory developments in the field dealt with the legal position of satellite and cable television, and local terrestrial television. Law 35 of 22 December 1992 on satellite television completed the legal framework in which the transposition of the 1989 TWF Directive would finally take place, though it was derogated by a later text in 1995¹⁴⁷. In its seventh final disposition Law 37/1995 of 12 December 1995 of Satellite Telecommunications refers to the transposition of the TWF Directive. It states that “generalist programming of satellite television services remains under the scope of Law 25/1995”¹⁴⁸. It could be argued that this disposition would not apply when the programming is not of a generalist nature.

¹⁴⁵ Elena Salgado Méndez, General Secretary of Communications, Ministry of Public Works, Transport and the Environment (now Ministry of *Fomento*), in a letter of 24 November 1993 directed to V. Lazarov, then Director-General of Gestevisión-Telecinco.

¹⁴⁶ Preamble (*Exposición de Motivos*), Law 25/1994 of 12 July 1994.

¹⁴⁷ Law 35/1992 of 22 December 1992 of Satellite Television, BOE 308 of 24 December 1992. This Law was derogated in 1995, see note 148.

¹⁴⁸ Law 37/1995 of 12 December 1995 of Satellite Telecommunications, seventh additional disposition, BOE 297 of 13 December 1995.

Cable television was finally regulated by Law 42 of 22 December 1995. Article 12(1) referred to the transposition of the TWF Directive

“when the cable distribution of one television channel reaches more than fifty per cent of the subscribing homes in the territory of an Autonomous Region, or twenty five per cent of the subscribing homes in the State territory, advertising and sponsorship programming will be subject to Law 25/1995”¹⁴⁹.

The question is what happens to channels which do not reach those percentages. It is true that the scope of the TWF Directive did not cover local television, but nor did the European legislator define this category.

Finally, Article 8(2) of the Local Terrestrial Television Law states that in all cases, advertising on local television channels will be subject to the dispositions on illegal advertising, prohibited advertising and the advertising of alcoholic drinks that are laid down in Law 25/1994¹⁵⁰.

III. 4. 4. 3. The exercise of supervision and control

Spain does not have an independent regulatory body. The public sector is supervised by a Parliamentary Commission, which is dependent on the political composition of Parliament. The Board of Administrators of TVE also supervises the content of its programmes. This Board is composed of twelve members of all parliamentary political parties. The Board or the Director-General can be subject to questioning by the Parliamentary Commission, especially on the protection of minors. TVE also has an internal committee to supervise advertising. It is widely used by all advertisers, and other broadcasters respect its decisions, even when the campaigns do not go on national public channels. TVE has its own code of practice and norms for accepting advertising. These norms regulate the content and quality of advertising,

¹⁴⁹ Law 42/1995 of 22 December 1995 of Cable Telecommunications, BOE 306 of 23 December 1995.

and fix the limits for advertising airtime. The first code was set up in 1983. The norms were amended in 1990, and they incorporated the provisions in the General Law on Advertising. They also partially incorporated the provisions in the TWF Directive, since at that time there was no formal legal implementation of the TWF Directive in Spain¹⁵¹. The Government made them public, but in no way were they given a legal status other than as mere norms of behaviour.

The Law 25/1994 delegates control and supervision of the provisions in the Law to the Ministry of Public Works, Transport and the Environment, now of *Fomento* (Improvement). Article 18 of this law establishes that sanctions apply to both public and private broadcasters. In extreme cases, the Council of Ministers can impose the sanctions. It also delegates supervision and control over the regional channels to the regional governments. In the autonomous regions there is a similar system of Parliamentary Commissions. For sanction procedures, Article 19(2) of Law 25/1994 refers to the Law of Private Television except for the suspension of the licence. Fines are imposed after two warnings.

The fact that there is no proper independent regulatory body makes the supervision and control of television quite ineffective. Private channels are continuously warned but there is not much difference in their behaviour. Public service television, financed by advertising, is under the supervision of the Ministry. It would be unlikely for the Minister to impose sanctions on a channel whose Director-General is appointed by the Prime Minister.

In 1995 the Special Commission on the Study of Television Content presented before the Senate a proposal for the creation of a regulatory body similar to the French CSA. This

¹⁵⁰ Law 41/1995 of 22 December 1995 of Local Terrestrial Television, BOE 309 of 27 December 1995.

¹⁵¹ Resolution of the General Directorate of Mass Media of 17 April 1990 making public RTVE's Norms of admission of advertising, BOE 95 of 20 April 1990, corrected in BOE 155 of 29 June 1990.

Spanish CSA would have consultative and informational functions, and it would exert control over the laws and norms on audio-visual policy¹⁵². The council would handle complaints from viewers. At the time of writing, the proposal is still blocked in the Senate.

III. 4. 5. UK

III. 4. 5. 1. The 1990 Broadcasting Act

The UK system uses a form of administrative action to regulate the provisions of the TWF Directive in an exhaustive but precise way. The TWF Directive is therefore transposed into the UK legal system, mainly through the 1990 Broadcasting Act.

“The Act also implements the Council of Europe Convention on Transfrontier Television, which facilitates the transfrontier transmission and re-transmission of television programme services, and the EC Directive on Broadcasting, Dir. 89/552/EEC which provides for the limited harmonisation of Member State’s laws on advertising, the protection of children and copyright in the broadcasting field”.¹⁵³

Sections 7, 8 and 9 of the Broadcasting Act delegate to the Independent Television Commission (ITC) the powers to draw up guidance, on the supervision and control of advertising for private television. The Broadcasting Act authorised the ITC to regulate issues specified in the TWF Directive through Codes of Practice.

III. 4. 5. 2. The regulation of advertising-funded television channels: The statutory solution

The ITC was created in 1990 in the place of the Independent Broadcasting Authority. The ITC Codes are: The Code of Advertising Standards and Practice, The Code on Programme

¹⁵² Senate (1995) Proposal of the Especial Commission on the study of television content, BOCG (Senate) 342 of 13 November 1995, 1.

¹⁵³ Preliminary Note, 1990 Broadcasting Act.

Sponsorship, The Rules on Advertising Breaks and The Programme Code¹⁵⁴. All four Codes explicitly enact the requirements of the TWF Directive.

Cable and satellite channels are also regulated by the ITC but they are subject to different rules than is terrestrial television. In fact, this is two-tier regulation. The reason, according to Frank Willis is that cable and satellite do not occupy terrestrial frequencies and therefore do not have to comply with the public service remit of terrestrial channels. A second reason is that these channels, if subject to tight controls, would not be able to survive since they are market driven and not public service channels¹⁵⁵.

A corollary of this two-tier regulatory situation is the issue around the concept of jurisdiction, and the criteria established in the 1990 Broadcasting Act to determine jurisdiction. Section 43, as seen before, established the criteria to define domestic and non-domestic satellite channels. Section 43(1) stated that domestic satellite channels should comply with Section 16 except for subsections (a) to (f), which established public service requirements in the case of Channel 3. Therefore, subsection 16(g), requiring a proportionate amount of European work in the programme schedules, would apply to domestic satellite channels. Section 43(2) defined non-domestic satellite channels, and did not mention any requirements to compliance with section 16. Competition rules were therefore different for non-domestic satellite channels under UK jurisdiction¹⁵⁶.

¹⁵⁴ ITC Code of Advertising Standards and Practice, Summer 1997; ITC Code of Programme Sponsorship, March 1997; The ITC Rules on Advertising Breaks, January 1991; ITC Programme Code.

¹⁵⁵ Frank Willis, ITC, interview in London, November 1995.

¹⁵⁶ ECJ, Judgement of 10 September 1996 in Case 222/94, *Commission v United Kingdom*, 1996 ECJR I-4058.

III. 4. 5. 3. The BBC's commercial operations

The public broadcaster operates in an increasingly commercial market and it has developed many relationships with that market. The BBC programmes must comply with the BBC Producers' Guidelines, which are mainly concerned with editorial issues¹⁵⁷. These guidelines cover issues on the acceptability of BBC commercial ventures, the use of the BBC brand, promotional activities, fair trading and market testing. These editorial rules also apply to all independent productions.

In relation to advertising, no BBC service funded by licence fee or grant may carry advertising or sponsorship. However, BBC World-Wide Television, which is commercially funded, is permitted to take advertising. It can also carry sponsorship for some programmes.

As a general rule, the ITC is responsible for all television broadcasting, except those BBC channels in the UK, which do not carry advertisements. BBC commercially television services uplinked (and established in) from the UK are required to conform with the ITC Codes of Practice. In addition to the ITC Code of Sponsorship, the BBC has also drawn up its own stricter code in order to guarantee the integrity of the sponsored programmes¹⁵⁸.

The Producers' Guidelines comprehend the BBC coverage of sponsored events, and sponsorship of BBC events, or events for which the BBC may accept co-sponsorship from an outside body. This money can only be used to enhance the event itself and must not be used to pay for the broadcast coverage. The issue will be studied in Chapter VI of this thesis. Co-productions should not provide a back door for sponsors, and in some cases, when there are

¹⁵⁷ BBC Producers' Guidelines, "Commercial Relationships", Chapter 28, London, November 1996, 215.

¹⁵⁸ "Guidelines for Sponsorship on the BBC's International Television Channels", BBC Editorial Policy, BBC World-Wide, London, 26 January 1996.

strong public interest reasons, programmes may be co-funded with grants from government departments or agencies. Other commercial issues covered by the Producers' Guidelines are joint editorial initiatives or off-air promotions with publications.

III. 4. 5. 4. Self-regulation in the control of advertising content

The ITC requires all television companies which it licences to comply with the Codes. Licensees are expected to have adequate procedures to check all advertising proposals before accepting them for transmission. The ITC monitors the advertisements, and can require amendment or withdrawal of those which do not comply with the rules. Any direction to withdraw the advertisement has a mandatory and immediate effect¹⁵⁹. In practice, the Broadcast Advertising Clearance Centre (BACC) is the industry body responsible for the pre-transmission examination and clearance of television advertisements. If any licensed broadcaster fails to comply with the conditions set out in the Broadcasting Act or in the ITC Codes, the latter can impose penalties, which range from warnings to the shortening or revocation of the licence¹⁶⁰.

In the case of medicines there is a national trade association, the Proprietary Association of Great Britain (PAGB), which represents manufacturers of over the counter medicines (OTC) and food supplements. This Association, founded in 1919 to protect the public from misleading advertisements for medicines, has drawn up a Code of Standards of Advertising Practice for OTC's and, recently, a Code of Practice for Advertising Over the Counter Medicines to Health Professionals and the Retail Trade¹⁶¹. The PAGB Code of Standards is the primary means of advertising control for OTC medicines. Its provisions go beyond those of the law and member must observe its requirements in addition to any statutes that apply.

¹⁵⁹ ITC (1996) "Advertising and Sponsorship on Commercial Television", brochure.

¹⁶⁰ Broadcasting Act 1990, Sections 40 and 41.

The Association checks member's copy for conformity. The primary control over OTCs is the product licence issued by the Licensing Authority (the Medicines Control Agency). The licence specifies the condition for which the product can be sold. This is the framework for advertising and packaging information. The ITC has enforcement powers for television advertisements¹⁶².

¹⁶¹ PAGB, *Code of Standards of Advertising Practice for Over the Counter Medicines*, 1994 edition.

¹⁶² Radio advertising of OTCs is controlled by the Radio Authority.

III. 5. Conclusions

The chapter has given an overview of the regulatory frameworks that are in place both at European and at the national level and which constrain television advertising and sponsorship. The 1989 TWF Directive set out European goals for audio-visual policy. The road to its adoption was not easy. In the end, the TWF Directive was a compromise between all parties involved, i.e. the television and advertising industries and the corresponding regulators. It was a compromise between diverging national and European media policies, and a compromise between diverging intra-national objectives. Other European initiatives also looked into audio-visual policy at the time when the TWF Directive was being drafted, in particular the CoE Convention on Transfrontier Television. The CoE Convention's provisions for advertising and sponsorship were adopted in the TWF Directive. The texts have strong similarities, but their differences have proved to be significant in the practical implementations of EU rules.

In some cases the country of origin principle, on which the TWF Directive is based, has been difficult to determine. The principle, according to which broadcasters are subject only to the law of the country which has jurisdiction over them, is the key to the growth of transfrontier television services. The criteria for jurisdiction applied by the CoE Convention and the TWF Directive are different. The CoE Convention applies the criterion of transmission to determine jurisdiction, whereas the TWF Directive does not expressly define how to determine jurisdiction. The Commission's opinion was that the criterion to be used is the place of establishment, or the place in which a broadcaster has its principal place of business. The criterion was ratified by the ECJ several times. However, the ECJ judgement in *De Agostini* opens the possibility for Member States to stop transmission from other Member States on the basis of misleading advertising. The Directive on Misleading Advertising works under the principle of minimum standards. This means that Member States are free to impose on all

broadcasters transmitting in their territory stricter restrictions in the matter of misleading advertising for the protection of consumers. It raises the issue of what the concept of misleading advertising means in each Member State, and to what extent the protection of consumers will be subject to bargaining for the creation of a Single Market in television. Other initiatives in European regulation that could affect television advertising come from other policy areas within the European Commission, such as consumer protection and public health, Internal Market objectives or audio-visual policy aims.

There is a tension between European regulation and national interpretations. Application of the rules of the TWF Directive is the responsibility of each Member State's national regulatory authority. The TWF Directive has had to be implemented according to the national legal systems. Because of the manner in which Community Law is implemented in the national legal systems, part of the flexibility necessary for a free flow of services was lost. The TWF Directive has been implemented in laws, and in other statutory provisions, as well as in self-regulatory codes. Their enforcement varies accordingly.

Member States have to ensure that appropriate measures are applied to secure compliance with the provisions on television advertising and sponsorship. The second part of the chapter described how the national actors in the regulatory process function and how they exert their powers. The choice of control bodies is diverse, and their scope is more or less limited according to national legislation. Some have proper regulatory powers, some only have powers of interpretation, some have powers of sanction. How these organisations interact with the market actually shapes results in more or less strict compliance. In France, the CSA interpreted the provisions in the law and issued detailed guidelines that are in fact the body of provisions governing television advertising and sponsorship. The French implementation happened within a framework of legal confusion about the CSA's powers to regulate. Public

broadcasters also contest the CSA's power to impose sanctions over them. Germany is dominated by the dual system in which public and private broadcasting develop. Private broadcasters are regulated by the *Werberichtlinien* issued by regional *Landesmedienanstalten*, whereas public channels only respond to the RfStV. This makes them more flexible in their understanding of the advertising and especially of the sponsorship provisions. Italy initially did not implement the TWF Directive fully. Spain implemented the TWF Directive in one single law. The sanction procedures are therefore long. No further interpretation of the law was used in Spain. Because the implementation came late, most of what was contentious from 1990 to 1994 was covered by the existing legal void. Finally, the UK has followed the statutory solution, laying down detailed guidelines in the ITC Codes.

The different levels of interpretation have allowed for different issues to occur. The provisions in Chapter IV were very straight forward and regarded as easy to implement, a statement that will be discussed throughout this thesis. The analysis of the key issues that arise from the diverging implementations constitutes the subject of the next section.

SECTION II

CHAPTER IV

TELEVISION ADVERTISING

IV. 1. Introduction

Television or spot advertising, is the most usual form of advertising, and for some commercial broadcasters is their largest source of revenue. Any regulation determining the amount of spot advertising allowed in any given period of time has a direct effect on a channel's revenue. The adoption of such rules is surrounded by heated debate and all parties involved have to reach compromises.

The Council of Europe (CoE) Convention on Transfrontier Television contained guidelines and limits on the time and content of spot advertising and sponsorship, for certain product categories. But these limits were based on commercial practices and on the existing codes of practice, such as the International Code of Advertising Practice of the International Chamber of Commerce¹. The 1989 TWF Directive adopted similar provisions. It uses the phrase "television advertising" in its definition, but refers to "spot" advertising in subsequent articles. Spot advertising is therefore understood as the traditional form of television advertising.

Provisions in Chapter IV of the TWF Directive are deemed to be quite specific. Although without the "where practicable" let out clause that applies to quotas, television advertising

and sponsorship provisions are not precise enough to avoid diverging national interpretations, because the purpose of the legislator was not to harmonise, but to approximate. The compromise is shown in the flexible wording and balanced interpretations. There have been several cases brought before the European Court of Justice (ECJ) in order to clarify these provisions in the light of the free flow of services. Vested and contradictory interests of advertisers, national political and cultural media policies, but also television content providers such as sports and teleshopping, have helped to define the TWF Directive at both European and national levels.

IV. 2. Definition

The TWF Directive defines television advertising in Article 1. The definition applies to what is called “spot” advertising as opposed to other forms of commercial communication, such as sponsorship or direct offers to the public. Article 1(b) defines television advertising as:

“any form of announcement broadcast in return for payment or for similar consideration by a public or private undertaking in connection with a trade, craft or profession in order to promote the supply of goods or services, including immovable property, or rights and obligations in return for payment. Except for the purposes of Article 18, this does not include direct offers to the public for the sale, purchase or rental of products or for the provision of services in return for payment.”

It establishes that payment should be involved in the transaction. The definition does not differentiate between direct and indirect payment. It excludes channel self-promotion and any advertising in which no payment is involved. Self-promotion occupies airtime just as advertising does.

Advertising implies the advertiser’s intention to promote the supply of goods or services.

Television advertising pursues the objective of presenting products or services to the

¹ Council of Europe (1989) Explanatory Report to the Convention on Transfrontier Television, Strasbourg, 5 May 1989, STE N° 132; ICC Code of Advertising Practice in Maxeimer, J. and

audience. Therefore, any product presentation which is unintentional lies outside the definition of television advertising.

Finally, Article 1 specifically excludes direct offers to the public from the definition of television advertising. The use of the word “such” in the phrase “forms of advertising such as direct offers to the public” has prompted clarification from the European Commission on several occasions. In the Commission’s opinion, under the 1989 TWF Directive a television service that includes direct offers to the public for the sale or rental of a product or service is covered by the definition of television broadcasting. Therefore, teleshopping, where provided in the course of the normal schedule is subject to the airtime restrictions for such types of broadcasts in Article 18, e.g. it may in no circumstances exceed one hour per day². The commercial issue was whether the word “such” was being used to point an example, e.g. teleshopping, or whether it meant “equal to”, e.g. excluding other forms such as telepromotions. It was important to clarify the question because some forms of communication, not necessarily assimilated to direct offers to the public, occupy more airtime than traditional advertising. A limit on these would make them commercially not possible.

Schotthöfer, P. (1992) *Advertising Law in Europe and North America*, Denver:Kluwer, 365.

² Commission of the European Communities (1995) “Report on application of Directive 89/552/EEC”, COM(95) 86 final, Brussels, 31 May 1995, 22.

IV. 3. Areas of discussion

IV. 3. 1. Clear identification of advertising

In order to protect the viewer, advertising should be clearly separated from the rest of programmes. This is stated in Article 10(1) as follows:

“Television advertising shall be readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.”

The TWF Directive is not very specific about what type of optical and/or acoustic means should be used in differentiating advertising from programmes. Television channels do not always use a credit to separate programming, leading the viewer directly into advertising from advertising breaks. Just a small word in one corner stating “advertising”, or even raising the volume level could be enough to meet the requirement of identification.

IV. 3. 2. Position of breaks

As a general rule advertising is inserted between programmes. There is certainly the possibility to insert breaks within programmes provided that they respect various guidelines. Isolated spots shall remain the exception³.

Article 11(1) establishes the possibility to insert centre breaks:

“(…)Provided the conditions contained in paragraphs 2 to 5 of this Article are fulfilled, advertisements may also be inserted during programmes in such a way that the integrity and value of the programme, taking into account natural breaks in and the duration and nature of the programme, and the rights of the rights holders are not prejudiced.”

³ Article 10(2), Council Directive 89/552/EEC of 3 October 1989, OJ L 298 of 17 October 1989, 23.

The exceptions, according to the type of programmes, include sports programmes or programmes that consist of autonomous parts, or which have natural intervals, where a break could be inserted during natural intervals without disturbing viewers.

“In programmes consisting of autonomous parts, or in sports programmes and similarly structured events and performances comprising intervals, advertisements shall only be inserted between the parts or in the intervals.”⁴

A minimum time must elapse between commercial breaks for all other cases:

“Where programmes, other than those covered by paragraph 2, are interrupted by advertisements, a period of at least 20 minutes should elapse between each successive advertising break within the programme.”⁵

Because the TWF Directive only mentions breaks within programmes, breaks at the beginning or at the end of certain programmes, do not necessarily have to comply with the twenty minute rule. This makes it possible for two breaks to follow each other at an interval of less than twenty minutes.

IV. 3. 3. Advertising and programme category

Some programme categories are subject to special restrictions because of their informational or cultural nature, and they are: Films and television-made movies, news and current affairs, religious services and children’s programmes. The legislators wanted to preserve their integrity. In particular, films and TV-movies, and children’s programmes constitute the main source of content for television channels. Regulation of advertising in these categories is prone to problems because of their particular ability to draw a specific type or size of audiences. More references to this issue are given in Article 11(3) and (5) on breaks inserted in films and television movies.

⁴ Article 11(2), *ibid.*

⁵ Article 11(4), *ibid.*

IV. 3. 3. 1. Films and TV movies

The TWF Directive established a specific regime for advertising breaks within films and films made for television:

“The transmission of audio-visual works such as feature films and films made for television (excluding series, serials, light entertainment programmes and documentaries) provided their programmed duration is more than 45 minutes, may be interrupted once for each complete period of 45 minutes. A further interruption is allowed if their programmed duration is at least 20 minutes longer than two or more complete periods of 45 minutes.”⁶

Broadcasters often schedule films in prime-time because of their audience appeal. The restricted availability of airtime potentially affects their revenue. This is more important for new broadcasters, or satellite and cable television channels. Films are easy to schedule and probably less expensive than in-house, national oriented productions. Channels would be reluctant to lose their ability to insert more breaks at a time when the audience level is high. A second issue is whether films made for television should fall into this restriction. Much discussion went on concerning their non-inclusion. Are they as cultural a product as feature films? Or could they be considered for centre breaks occurring every twenty minutes, like other programmes?

IV. 3. 3. 2. What does programmed duration mean?

Article 11(3) has been subject to debate and has been implemented in different ways by national authorities. The notion of duration is not clear. Does it refer to the total scheduled time or just to the actual film time? Whether total scheduled duration includes or excludes all advertising makes a difference when calculating the number of centre breaks. There was also a translation issue. The original text of the TWF Directive had been drafted in French, using the wording *durée programmée* (meaning scheduled duration). The subsequent English

⁶ Article 11(3), *ibid.*

version of the TWF Directive used “programmed duration”, a translation of the French words, leading to differences of interpretation⁷.

The European Commission has been asked to give its interpretation, and has always adopted the “gross” point of view. Its position is clear in the Explanatory Memorandum on the amended proposal for the revision of the TWF Directive in reference to the European Parliament amendments of Article 11.

“The Commission cannot accept the part of the amendment stating that the basis for the calculation of the number of breaks allowed should be scheduled duration “exclusive of all interruptions”. This would impose an unnecessary restriction that would impact very negatively on broadcasters’ revenue streams.”⁸

However, one should note that Member States are free to establish stricter requirements for channels under their jurisdiction.

IV. 3. 3. 3. Other programmes

Setting aside the special provisions for films and films made for television, the TWF Directive imposes a ban on advertising inserted within religious services, and within documentaries, news and current affairs programmes, and religious and children’s programmes less than thirty minutes long.

“Advertisements shall not be inserted in any broadcast of a religious service. News and current affairs programmes, documentaries, religious programmes, and children’s programmes, when their programmed duration is less than 30 minutes shall not be interrupted by advertisements. If their programmed duration is of 30 minutes or longer, the provisions of the previous paragraph shall apply.”⁹

Once again, the absence or presence of a centre break in news and current affairs programmes is defined by what programmed duration means. The usual time slot for news

⁷ Letter to Gregory Paulger, DG X-C/1 from Souné Wade, at the time Secretary General of ACT, 27 March 1995; Frank Willis, ITC, interview in London, November 1995.

⁸ Commission of the European Communities, Explanatory memorandum to the amended proposal for a EP and Council Directive 89/552/EEC, COM (96) 200 final, OJ C 166 of 10 September 1996.

and current affairs programmes is thirty minutes. If scheduled duration is applied, the time slot would include the duration of the programmed centre break, and in this case, the actual programme duration might be slightly under thirty minutes. If programmed duration is applied, and the actual programme duration is exactly thirty minutes, channels have two options: either they eliminate the centre break to keep the format to exactly thirty minutes, assuming a loss of revenue, or, they insert a centre break within a programme lasting thirty minutes, and over-run the thirty minutes slot. In this case, since total duration would be well over thirty minutes, schedules would be very difficult to manage, and they would become impracticable with programmes being moved forward all the time because of the inexact slot times¹⁰.

There is also a controversy over what current affairs programmes should look like. The question is whether the term “news” covers television newscasts alone, or any current affairs report in a magazine programme. According to the EBU, current affairs programmes means magazines strictly devoted to current events, such as news comments and analysis and political statements on current affairs¹¹. For the Association of Commercial Television, current affairs programmes are defined as programmes in which there is hard news or political content¹². If these programmes last more than thirty minutes, the TWF Directive provisions allow centre breaks separated by a twenty minute period.

⁹ Article 11(5), Council Directive 89/552/EEC of 3 October 1989.

¹⁰ Frank Willis, ITC, interview in London, November 1995.

¹¹ EBU, Commentary on the “Television without Frontiers” Directive and the European Convention on Transfrontier Television, *EBU Review, Programmes, Administration, Law*, Vol. XLI, N° 4, July 1990, pp. 10 and 13.

¹² ACT letter to Gregory Paulger, DG X, mentioned above.

IV. 3. 4. Television advertising, public health and consumer protection

Article 12 of the TWF Directive establishes some content requirements for television advertising for the protection of viewers. Television advertising shall not prejudice respect for human dignity, include any discrimination on grounds of race, sex or nationality, be offensive to religious or political beliefs, encourage behaviour prejudicial to health, safety or against the environment¹³.

“Sensitive” products from a public health and consumer protection point of view receive special treatment in the 1989 TWF Directive. The regulation of the television advertising of sensitive products is related to other main EU policy areas, consumer policy and the creation of a Single Market. The 1989 TWF Directive also laid down some rules to ban or restrict certain product categories on the grounds of health and safety and for the protection of viewers. These categories are tobacco products, alcoholic beverages and medicinal products available only on prescription. Chapter IV in the 1989 TWF Directive specifically does not mention children’s advertising but Article 16, as explained in the previous chapter, provides that advertising shall not cause moral or physical harm to minors by exploiting their inexperience or credulity; it shall not encourage the parents to purchase goods advertised, it shall not exploit the special trust minors place in teachers and parents, and it shall not unreasonably show minors in dangerous situations¹⁴.

The TWF Directive treats each of the said product categories differently, from banning some completely to giving some guidelines on the content for others. Articles 13 to 15 set the basic rules on advertising content.

¹³ Article 12, Council Directive 89/552/EEC of 3 October 1989.

¹⁴ Article 16, *ibid.*

IV. 3. 4. 1. Prohibited products

IV. 3. 4. 1. a. Tobacco

Tobacco products are banned in Article 13:

“All forms of television advertising for cigarettes and other tobacco products shall be prohibited.”

One issue is whether the ban also refers to the indirect advertising of tobacco, that is, advertising of brands, or logos of tobacco-related products, for example on billboards during the broadcast of a sports event. In the case of tobacco advertising, the discussion has always been centred on health issues. Tobacco products were already strictly regulated at national level before the introduction of the TWF Directive, and in general, Article 13 has been well translated into national legislation, in most cases by existing regulation. All Member States now have a ban on tobacco advertising on television.

The draft of a Directive on tobacco advertising proposes a ban on all forms of advertising for tobacco products, without prejudice to the TWF Directive¹⁵.

IV. 3. 4. 1. b. Medicines on prescription

The TWF Directive also bans the advertising of medicines available only on prescription.

“Television advertising for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the broadcaster falls shall be prohibited.”¹⁶

There are variations on the rules for pharmaceutical products, among the countries studied. Even in the case of over the counter (OTC) products, or products which do not need a

¹⁵ Article 2, Amended proposal for a Council Directive on advertising for tobacco products, COM (92) 196 final, OJ 129 C of 21 May 1992.

prescription, Italy and France require pre-notification for advertising, and France prohibits sales promotions. Spain and Germany require detailed information on the screen for television advertising. In media other than television, because the list of drugs on prescription or on the national insurance drug lists are not the same from one Member State to another, it is only possible to advertise drugs on a pan-European basis that are not on any list. In the case of television, the principle of country of origin would apply¹⁷. Advertising of OTC's still differs according to national legislation, so there is no effective co-ordination.

Advertising of OTC products is subject to the provision on the Directive on the Advertising of Medicinal Products for Human Use, adopted in 1992, which banned the advertising of prescribed pharmaceuticals and of those containing psychotropic or narcotic substances. Non-prescribed pharmaceuticals may be advertised but are subject to a market authorisation and to stringent conditions¹⁸.

¹⁶ Article 14, Council Directive 89/552/EEC of 3 October 1989.

¹⁷ Green Paper on Commercial Communications, *op.cit.*, 27.

¹⁸ Articles 2 to 5, Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use, OJ L 113 of 30 April 1992; Article 2 refers to the prohibition by Member States of any advertising of a product in respect of which a market authorisation has not been granted.

IV. 3. 4. 2. *Products subject to guidelines: alcohol advertising*

The 1989 TWF Directive contained a series of restrictions on alcohol advertising on television.

“Television advertising for alcoholic beverages shall comply with the following criteria:

(a) it may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;

(b) it shall not link the consumption of alcohol to enhanced physical performance or to driving;

(c) it shall not create the impression that the consumption of alcohol contributes towards social or sexual success;

(d) it shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;

(e) it shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;

(f) it shall not place emphasis on high alcoholic content as being a positive quality of the beverages.”

The rules in the five countries studied have different degrees of severity. Some have laid down further restrictions, by means of law, codes, or voluntary agreements, which range from a total ban to restrictions on the content or style of advertising, from alcoholic gradation to the times when the advertisements are broadcast.

From the commercial point of view, the different national rules prevent many manufacturers from entering some markets and force them to shift to price competition. Bans, like the one imposed in France by the Evin Law affect sports events because these advertisers are often their main sponsors. Other issues relate to the different competitive conditions that this legislation can create. The European Court of Justice ruled in *Aragonesa de Publicidad* that stricter rules regarding the advertising of alcoholic drinks should be applied equally to national and to foreign businesses, when the rule aims to protect public health¹⁹. However, there is great concern within the commercial sector that further and stricter regulation for the

¹⁹ European Court of Justice, Judgement of 25 July 1991 in Joined Cases C-1/90, C 176/90 *Aragonesa de Publicidad Exterior y Publivia SAE v Generalitat de Catalunya* (1991) ECR, I-4151.

sake of public health usually hides protective measures against competition and makes cross-border commercial communications very difficult.

IV. 3. 4. 3. A case of its own: children's advertising

In relation to advertising directed at children, some Member States outside the scope of this thesis have implemented bans at various levels, for example in Greece where the advertisement of toys is banned between 7.00 a.m. and 10.00 p.m., or in Sweden where advertising was banned in programmes aimed at children below the age of twelve. Other Member States rely on advertising content, timing and copy restrictions or partial bans on the type of toys, under the provisions of Article 16²⁰. Variations between Member States in applying copy clearance for advertisements directed at children raised commercial concerns about how such national restrictions reduce advertising and sponsorship revenues for children's programmes²¹. Bans on television advertisements directed at children that are broadcast from another Member State have therefore proved to be controversial by opposing two main European policy aims, consumer protection and the free flow of goods and services²².

Council Directive 84/450/EEC concerning misleading advertising required Member States to ensure adequate and effective means for the control of misleading advertising in the interests of consumers, competitors and the general public²³. The ECJ ruled in July 1997 that the 1989 TWF Directive did not preclude a Member State from taking, pursuant to general legislation on the protection of consumers from misleading advertising, measures against an advertiser

²⁰ Lionel Stanbrook (1997) "Children's advertising, consumer protection and the country of origin principle", *Commercial Communications*, Issue 9, October, 18.

²¹ Green Paper on Commercial Communications, op. cit., 26.

²² See Chapter III, p.16.

in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State. The 1989 TWF Directive was to be interpreted as precluding the application to television broadcasts from other Member States of a provision of a domestic broadcasting law which provides that advertisements must not be designed to attract the attention of children under twelve years of age²⁴.

IV. 3. 5. Amount of advertising time allowed

One contentious issue is the amount of broadcasting time dedicated to advertising. Total advertising airtime available constitutes the total amount for sale in advertising-funded television. How and in which form this airtime is sold has almost a direct effect on television revenues and content. On the other hand, it is not possible to stockpile airtime: advertising time that is not sold is revenue lost for ever.

Article 18 limits the amount of advertising each channel can broadcast. The article differentiates between spot and other forms of television advertising. National implementations are therefore found in different statutory and legal texts, according to which form of advertising, spot, sponsorship or other, is being regulated. There are two main issues in the implementation of this article: first, the two sets of limits are laid down in the 1989 TWF Directive setting a maximum of time for each advertising category both during a given broadcasting day and in any given hour. Second, the limits, in particular those for teleshopping, were set before some specific forms of commercial communication had been

²³ Council Directive 84/450/EEC of 10 September 1984 on the approximation of laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250 of 19 September 1984, 17.

²⁴ ECJ, Judgement of 9 July in Joined Cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen v De Agostini (Svenska) Forlag AB*, in *Common Market Law Review*, Vol. 34, N°6, December 1997, pp. 1445-1468.

properly developed in European television. These new forms of commercial communication were classified in different ways because they were not defined in the 1989 TWF Directive, and thus their status has been defined separately by individual Member States²⁵.

Article 18 paragraphs (1), (2) and (3) set the limits of advertising as follows:

“1. The amount of advertising shall not exceed 15% of the daily transmission time. However, this percentage may be increased to 20% to include forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, provided the amount of spot advertising does not exceed 15%.

2. The amount of spot advertising within a given one-hour period shall not exceed 20%.

3. Without prejudice to the provisions of paragraph 1, forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services shall not exceed one hour per day.”

Total daily television advertising consisted of one limit on spot advertising and another for other forms, such as direct offers to the public. The maximum spot advertising allowed per hour was established at twenty per cent. A third daily limit of one hour a day was set for direct offers to the public.

Although spot advertising still makes up most of the airtime available to advertisers, the latter also look to new forms of commercial communications to avoid advertising clutter, to reach audiences, or to promote their image or their products, according to their various marketing strategies. The daily limit aims to protect the viewer against too much advertising, whereas the hourly limit aims to prevent the concentration of advertising during particular periods of the day, such as prime-time. Problems arise when categories cross boundaries or practice blurs the meaning of key concepts. This leads us into the next issue. What does the text mean by “one hour”?

²⁵ Veronica Longhi, Mediaset, interview in Milan, July 1996.

IV. 3. 5. 2. Clock hour

For the hourly limit, the clarification of what is an “hour” is needed. Is it any hour, any sixty minutes counted at any given moment, a sliding hour, or a clock hour, e.g. from 6.00 h to 7.00 h? The 1989 TWF Directive was not clear, and individual Member States have applied different interpretations. The sliding hour restricts the scope for concentrating advertising more severely. The complexity of calculations constitutes an argument in favour of the clock hour. The European Commission has opted for the latter interpretation, because the sliding hour is difficult to manage by broadcasters at the practical level²⁶. The new 1997 TWF Directive refers to “clock hour” for the purposes of the hourly limit on spot advertisements²⁷.

²⁶ Commission of the European Communities, Report on Application of Directive 89/552/EEC, COM(95) 86 final, Brussels, 31 May 1995, 41.

²⁷ Article 18(2), European Parliament and Council Directive 97/36/EC of 30 June 1997 amending Council Directive 89/552/EEC, OJ L 202 of 30 July 1997.

IV. 4. National interpretations

IV. 4. 1. France

IV. 4. 1. 1. Scope of the regulations

France incorporated the 1989 TWF Directive's provisions for television advertising and sponsorship into its legal system by Decree 92-280 of 27 March 1992, amending Law 86-1067 of 30 September 1986 on the freedom of communication²⁸. It replaced the previous Decree 87-37 of 26 January 1987 by adding new provisions for television advertising, and introducing definitions of sponsorship and surreptitious advertising²⁹. Decree 92-280 covers terrestrial and satellite television, and both non-encrypted public and private systems. This is a change from the 1987 Decree which excluded public service broadcasters. Under the 1992 Decree public broadcasters are actually subject to the control and sanctions of the CSA³⁰. Public channels are required by Article 48 of Law 86-1067 to fix the modalities of programming advertisements in their *Cahiers des Charges*, but the general principles in Decree 92-280 also apply³¹.

The Law 86-1067 required cable services to be licensed by the CSA. Both parties sign a *convention* (agreement) in which broadcasting conditions are laid down and agreed upon.

Cable television is regulated by Decree 92-882 of 1 September 1992, modified in January

²⁸ Law 86-1067 of 30 September 1986, amended, on the freedom of communication; Decree 92-280 of 27 March 1992 fixing the general principles on advertising and sponsorship, JO of 28 March 1992, 4313.

²⁹ Decree 87-37 of 26 January 1987 on the application of Article 27(1) of Law 86-1067, JO of 27 January 1987, 946.

³⁰ Article 21, Decree 92-280.

³¹ Article 36, *Cahier des missions et des charges de France 2* and Article 38, *Cahier des missions et des charges de France 3*, annexed to Ministerial Decree 94-813 of 16 September 1994 approving the *Cahiers des missions et des charges* of France 2 and France 3, JO of 18 September 1994, 13378.

1995, which lays down certain specific rules for cable channels, while stating that the advertising provisions in Decree 92-280 also apply for cable services³².

IV. 4. 1 . 2. Definition of television advertising

Television advertising is defined in Article 2 of Decree 92-280 as any message that is broadcast in return for remuneration or any other consideration. It excludes direct offers to the public. Television advertising had previously been mentioned several times in the law without having a proper definition. Decree 92-280 finally identifies advertising as a commercial activity, or the promotion of products and services within the framework of certain activities, of both public and private companies. The definition in the Decree also excludes public information announcements, e.g. messages of general interest, and those from non-profit organisations. Therefore they are not subject to advertising regulation, unless they are broadcast in exchange for remuneration. Nothing is said about self-promotion, but it could be considered as being within the scope of the Decree.

In the case of public channels, their *Cahiers des missions et des charges* establish that certain broadcast categories be transmitted for free, for example, the *émissions d'informations spécialisées* or public announcements such as messages about big national issues, about road security and consumer information³³.

³² Article 10, Decree 92-882 of 1 September 1992 amended by Decree 95-77 of 24 January 1995 regulating cable radio and television, JO of 25 January 1995, 1339.

³³ Articles 16 to 18, *Cahier des missions et des charges de France 2*; Articles 17 to 19, *Cahier des missions et des charges de France 3*, op. cit.

IV. 4. 1. 3. Specific issues

IV. 4. 1. 3. a. Number and frequency of advertising breaks

French regulators opted to protect audio-visual works by choosing to allow only one single break within them, and by banning public broadcasters from inserting advertising in audio-visual works, except in certain cases specifically authorised by the CSA.

Articles 3 to 8 of the 92-280 Decree establish the guidelines for advertising content, and transpose the TWF Directive's provisions for the protection of minors. Television advertising has to be clearly identifiable. Article 14 states that the volume level of the advertisements should be in line with that of the programme. However, it does not include criteria on how to measure this. It could become a rather meaningless rule, because it is subject to interpretation³⁴. Normally the distinction between the programme and the commercial break is in the form of a jingle or credits before and after the break. The acoustic identification must be specifically from the channel and should not remind viewers of any known tune.

Article 15 of the Decree establishes rules for the insertion of commercial breaks in programmes. In general, following the TWF Directive, advertising breaks are inserted between programmes. However, provided that advertising does not damage programme integrity, there can be breaks within the programmes if these contain natural intervals. Then, there is also the possibility of inserting a centre break within programmes that consist of autonomous parts, or natural intervals. In this case, the time between breaks should be no less than twenty minutes³⁵. As in the TWF Directive, the question that arises is what the frequency for other types of breaks should be. For example, breaks at the beginning or the

³⁴ Serge Ladhuie, CSA, interview in Paris, June 1996.

³⁵ Article 15(2) and (3), Decree 92-280.

end of a succession of very short but independent programmes could appear at less than twenty minute intervals from one another.

The “interval” rule can create problems in sports broadcasts. In tennis retransmissions, for example, breaks must be inserted between sets and not at the end of a game, where they can disrupt the continuity of the broadcast event³⁶. When important shots have been lost during the break, broadcasters can cover them during the replays, because they usually tape the whole event separately.

Newscasts, current affairs programmes (*magazines d’actualité*), children’s programmes and religious programmes must be at least thirty minutes long to have a centre break³⁷. The interpretation of current affairs programmes is a broad one, including financial and political debates³⁸. This is an exact transposition of Article 11(5) of the 1989 TWF Directive. Some broadcasters have agreed to stricter rules. For example, at the time of its privatisation, TF 1 agreed not to insert advertising within any news programmes, whether longer or shorter than thirty minutes.

The rules regarding the interruption of films and audio-visual works (*oeuvres audiovisuelles*) are stricter than those laid down in the TWF Directive. Only one single interruption is allowed except with the express authorisation of the CSA, for television services other than public channels and pay-TV³⁹. Films and audio-visual works are defined in Decree 90-66 of 17 January 1990 amended⁴⁰. *Oeuvres audiovisuelles* are then classified in the Decree as programmes other than cinematographic works, news bulletins and information programmes,

³⁶ Serge Ladhuie, CSA, interview in Paris, June 1996.

³⁷ Article 15(III), Decree 92-280.

³⁸ Serge Ladhuie, CSA, interview in Paris, June 1996.

³⁹ Article 73, Law 86-1067.

entertainment programmes, game shows, programmes other than in-house fiction, sports, advertising, teleshopping, self-promotion and teletext. Following the “negative” definition in the Decree, the CSA defined audio-visual works as fiction, animation other than fiction, documentaries, videomusic clips, research or creative programmes, and live broadcasts of theatre and concerts, soap-operas, telefilms, series, animation films, theatre adaptations, and programmes targeted at youngsters⁴¹. The CSA authorises a second centre break in films and audio-visual works when their programmed duration is over 150 minutes.

Public broadcasters are subject to stricter rules. They are banned from interrupting programmes at all. Nevertheless, their *Cahiers des mission et des charges* state some exceptions. France 2 and France 3 can interrupt sports events during their intervals provided that the break does not exceed the duration of the interval. Public broadcasters can also interrupt programmes defined as *émissions de flux*, that is, programmes that consist of different or separate parts. These programmes are other than audio-visual works, subject to the CSA authorisation and broadcast before 20.00 h. Decree 92-280 had used the phrase “natural intervals” (*intervalles naturels*) but the new *Cahiers* signed in September 1994 specified the concept as separate parts, identified by visual and aural elements⁴².

Private channels have different contracts with the CSA and have accepted the principle of a single centre break for the protection of audio-visual works. Although Decree 92-280 limits this single interruption to six minutes, TF1 has chosen to restrict its duration to four minutes and to insert only one single break, declining the possibility of the CSA allowing a second

⁴⁰ Articles 2 and 4, Decree 90-66 of 17 January 1990 amended by Decree 92-279 of 27 March 1992, on the general principles governing the broadcast of films and audio-visual works, JO of 18 January 1990.

⁴¹ Rapport Cluzel 91-92 on the situation of the French audio-visual sector, 19 November 1991, Senate, Doc. 384, 2nd session, Paris:Official Journal Publications.

⁴² Articles 36 (France 2) and 38 (France 3), Decree 94-813 of 16 September 1994 approving the *Cahiers des missions et des charges* of France 2 and France 3.

interruption as an exception⁴³. For M6, the second largest private television channel, the single centre break can last the full six minutes allowed by the Decree⁴⁴. TF1 considered that restricting the length of the break to four minutes actually helped both the advertiser and the broadcaster by reducing advertising clutter, a phenomenon which in the presence of competing channels worries the advertising market⁴⁵. A second break could eventually be inserted if the programme lasts more than two hours and thirty minutes. No advertising is allowed during broadcasts of religious services.⁴⁶

The extension of the single interruption rule from films to audio-visual works started a heated debate among producers, broadcasters and regulators. Advertising-funded channels broadcasting mainly fiction feared that this rule would limit their scheduling. Producers were afraid that, because of their lower profitability these programmes would be relegated to off-peak hours, thus limiting the resources available for production. However, public broadcasters, the market leader TF 1 and the Advertisers Association *Union des Annonceurs*, have always favoured a single break because it seems to reduce clutter and the viewer is not saturated with advertisements⁴⁷.

IV. 4. 1. 3. b. Product and sector prohibitions

Following Articles 13 to 15 of the TWF Directive, the Decree restricts advertising content for public health reasons, and bans advertising of products prohibited by law (guns, tobacco products and medicines on prescription). The Decree also bans advertising of certain products and economic sectors, i.e. alcoholic drinks as laid down in Law 91-32 of 10 January 1991 or *Loi Evin*, and the film, publishing, press and retail distribution sectors for the

⁴³ Article 15(4), Decree 92-280.

⁴⁴ Article 15(4), *ibid*.

⁴⁵ Edouard Boccon-Gibod, TF 1, interview in Paris, June 1996.

⁴⁶ Article 16, Decree 92-280.

economic protection of other media⁴⁸. By means of these restrictions the State can influence the movement and media shares of advertising revenues⁴⁹.

Advertising messages for alcoholic drinks with more than one degree of alcohol were banned from television in 1988⁵⁰. The Evin Law in 1991 banned tobacco products from being advertised on television and increased the alcoholic limit from one degree to 1.2 degrees of alcohol, but media restrictions only entered into force in January 1993⁵¹.

Regulations on the content of advertising of pharmaceutical products are laid down in Law 94-43 of 18 January 1994, implementing the Directive on the advertising of medicinal products for human use⁵². Only medicines that have a market authorisation can be advertised.

Advertising of medicines available only on prescription is banned.

The prohibition of television advertising for certain economic sectors seems to respond to a desire by the regulator to protect the press. “Several sector prohibitions are mentioned in texts covering television and their only aim is to protect certain media, in particular the press, by reserving certain advertising markets exclusively for them”⁵³. As explained before, the main sectors banned from advertising on television are films and distribution. However, advertisements for films are allowed on cable channels dedicated to the cinema. This type of

⁴⁷ François Hurard, CSA, and Boccon-Gibod, TF 1, interviews in Paris, June 1996.

⁴⁸ Article 8, Decree 92-280.

⁴⁹ Serge Ladhuie, CSA, interview in Paris, June 1996.

⁵⁰ Decree 88-607 of 6 May 1988 amending Decree 87-37 of 26 January 1987 fixing the rules for advertising and sponsorship for certain television services, JO of 8 May 1988, 6611.

⁵¹ Article 3, Law 91-32 of 10 January 1991 bans, from 1 January 1993, all direct or indirect tobacco advertising and tobacco sponsorship; Article 10 restricts alcohol advertising to the press (except to that targeted to youngsters) and radio and billboards under the conditions laid down by the *Conséil d'Etat*.

⁵² Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use, JO 113 L of 30 April 1992; Law 94-43 of 18 January 1994, *Loi du médicament*, JO of 19 January 1994, 963.

⁵³ François Hurard (1995) “*La publicité audiovisuelle*”, in *Droit de l'Audiovisuel*, Gavalda, Ch. and Piaskowski, N. (eds.), Paris:Lamy, 860.

dedicated channel cannot insert advertising otherwise⁵⁴. The ban on the distribution sector was challenged before the ECJ in *Leclerc-Siplec*, but the court ruled that the French regulators could lay down stricter rules than those in the TWF Directive for television channels under their jurisdiction⁵⁵.

IV. 4. 1. 3. c. Airtime limits

Airtime limits are fixed for public broadcasters in their *Cahiers des missions et des charges*, therefore they emanate from the Prime Minister's regulatory power. On the other hand, airtime limits for private broadcasters are fixed in their authorisation agreement with the CSA, and therefore arise from the decision power of the CSA. Public broadcasters France 2 and France 3 have a limit of six minutes of annual average per broadcast hour, with a maximum of twelve minutes per hour⁵⁶. *La Cinquième* set its limits at four and nine minutes respectively.

A CNCL Decision in 1987 fixed the time dedicated to advertising for private broadcasting. It allowed private terrestrial broadcasters a daily average of nine minutes per hour, without exceeding twelve minutes per hour⁵⁷. In its authorisation document, TF1 was allowed nine minutes per hour daily average, and a maximum of fifteen minutes an hour⁵⁸. However, TF1 voluntarily agreed to comply with the stricter limits imposed on other private broadcasters, and to broadcast only six minutes per hour as a daily average and a maximum of twelve minutes in any given hour. M6 was initially allowed to broadcast six minutes of advertising

⁵⁴ Article 16, Decree 92-882.

⁵⁵ ECJ, Judgement of 9 February 1995, *Leclerc-Siplec v TF 1 publicité et M6 publicité*, C-412/93, 1995 ECR, I-179.

⁵⁶ Article 39, *Cahiers des missions et des charges de France 2*; Article 41, *Cahiers des missions et des charges de France 3*.

⁵⁷ Article 10, CNCL Decision 87-2 of 15 January 1987 on the special obligations of private national terrestrial non-encrypted television channels, JO of 27 January 1987.

per hour as a daily average and a maximum of ten minutes forty eight seconds per hour⁵⁹. In 1994, the CSA allowed the hourly limit to become twelve minutes. The latter is now set in line with the provisions in Article 18 of the TWF Directive, while the daily limit is more restrictive. Six minutes in a total of twenty broadcasting hours, for example, corresponds to ten per cent, whereas the TWF Directive would allow up to nine minutes, if the fifteen per cent rule was applied.

Canal Plus follows the terms in its convention, signed with the CSA on 1 June 1995. Advertising time is limited to ten per cent of average daily non-encrypted broadcasting time, with a maximum of twenty per cent per non-encrypted broadcast hour⁶⁰.

The regulator is more lenient for cable broadcasters, allowing a maximum of nine minutes of advertising time an hour as daily average, and not more than twelve minutes per hour. These limits could be extended for local cable channels within the national French territory, since they are not covered by the TWF Directive, creating a two-tiered regulation. Thus, the limits for local cable channels can be raised to a daily average of twelve minutes of advertising time per hour, and not more than fifteen minutes per hour⁶¹.

France applies the principle of the sliding hour, *heure glissante*, or calculating the maximum allowances at any given moment. Although not necessarily so, this moment could be at the start of a clock hour, *heure ronde*, e.g. from 19.00 h to 20.00 h⁶².

⁵⁸ Article 17, *Cahiers des Charges de TF 1*, annexed to Decree 87-43 of 30 January 1987, JO 31 January 1987.

⁵⁹ Ten minutes forty eight minutes correspond to eighteen per cent advertising in one hour, as first proposed by the Commission in Article 14, Amended Proposal for Council Directive 89/552/EEC, COM(88) 154 final, 21 March 1988; see Chapter III, III. 2. 3.

⁶⁰ CSA (1996) *Réglementation et régulation audiovisuelles en France*, 81.

⁶¹ Article 11, Decree 92-882.

⁶² E. Boccon Gibod, TF 1, interview in Paris, June 1996.

Infomercials differ from traditional spots both by their exceptionally long duration -two or three minutes instead of the usual spot duration of thirty seconds, and by the telephone number displayed on the screen, to which the viewer can call and obtain information about the product or service advertised. They could either be considered as “long” advertisements or as teleshopping features, which are treated differently in the legal texts. The CSA has opted to consider infomercials as regular spot advertising and they therefore count towards both the daily and hourly airtime limits. It is a very restrictive interpretation, and commercial broadcasters would like the CSA to adopt a more lenient view, that is to consider them as direct offers to the public. The further five per cent allowed in the 1989 TWF Directive was not used to include other forms of communications such as direct offers to the public, but exclusively for teleshopping programmes. Airtime limits, therefore, apply only to spot advertising not teleshopping spots, or teleshopping-like spots, as will be discussed in Chapter VII.

IV. 4. 2. Germany

The *Rundfunkstaatsvertrag* of 31 August 1991 (RfStV) and its amendments transpose the provisions in the 1989 TWF Directive⁶³. The agreement covers radio and television and applies to both public and private television channels. It specifically bans political, ideological and religious advertising⁶⁴. Advertising is forbidden on ARD III, and on *Eins Plus* and 3Sat⁶⁵. The detail of the RfStV provisions is further specified in the public broadcasters’ guidelines, in *Länder* agreements for the private broadcasters (*Werberichtlinien*) and in other self-regulatory codes.

⁶³ *Staatsvertrag über den Rundfunk im vereinten Deutschland* (Inter-State agreement on broadcasting) of 31 August 1991, English translation in *Gesetzestexte*, Bonn:InterNationes, amended on 26 August 1996, in *Media Perspektiven Dokumentation*, N°I, 1996.

⁶⁴ Article 7(7), RfStV of 26 August 1996.

In Articles 7 and 8 the RfStV sets the general principles for both public and private broadcasters in television advertising and sponsorship. For public broadcasters, further rules are laid down in Articles 14, 15 and 17 on the regime for advertising breaks and time limits. Article 16 requires both ARD and ZDF to issue guidelines for the implementation of Article 3 on the protection of minors, and of Articles 7, 8, 14 and 15. These rules are drawn up in co-operation with the *Landesmedienanstalten*. Articles 14, 15 and 17 set the rules for advertising breaks and time limits for public broadcasters. For private broadcasters the rules for advertising and sponsorship are set in Articles 44 and 45. Finally, Article 46 requires that the *Landesmedienanstalten* issue common guidelines, the *Werberichtlinien*, also in co-operation with ARD and ZDF, to enact Articles 3, 7, 8, 44 and 45.

The RfStV also mentions *Dauerwerbesendungen*, a form of advertising which is known in other regulatory systems as “infomercials” or “long advertisements”. They are a German form of long advertisements allowed to private broadcasters. In order to qualify as *Dauerwerbesendung*, an advertisement has to last at least ninety seconds. Sometimes these long advertisements incorporate a direct offer to the public. This form of long advertisements will be analysed in Chapter VII⁶⁶.

IV. 4. 2. 1. General principles

The RfStV does not include a definition of television advertising as such. The distinction between programmes and advertising is one of the main principles in the RfStV.

⁶⁵ Article 15(2), RfStV, *ibid*.

⁶⁶ Article 7(4), RfStV of 26 August 1996.

The *Werberichtlinien* define advertising as “economic” advertising, which is therefore different from *soziale Appelle* or social advertising⁶⁷. The rules for the protection of minors and the protection of the environment and fair competition in either the *Rundfunkstaatsvertrag* or the *Werberichtlinien* also apply to advertising⁶⁸. Advertising must be clearly recognisable as such and must be separated from other parts of the programme through optical means⁶⁹. Rule 5(1) requires that a special sign or *Werbelogo* identifies the advertising break. The identification at the end of the break is compulsory if advertising and programme are not clearly differentiated. This *Werbelogo* is different from the broadcaster’s own logo, must last a minimum of three seconds and may consist of a fixed or moving image. The *Werbelogo* must carry the word “*Werbung*” or advertising. This provision will not apply when the broadcaster uses, for a long time, always the same and only that one logo. Images or references to programmes are not allowed as parts of the *Werbelogo*⁷⁰.

The principle of programme editorial independence from advertising is transposed in Article 7(2) of the RfStV. Rule 4 of the *Werberichtlinien* transposes the principle in greater detail and also prohibits any influence over scheduling times.

Advertising must neither damage the viewer’s interests, encourage behaviour which endangers the health or safety of the viewer, nor pose a threat to the environment. In addition, advertising in programmes directed at children must not damage their interests or exploit their inexperience⁷¹. The *Werberichtlinien* ban advertising targeted at children and

⁶⁷ Rule 8, *Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen, (Werberichtlinien)*, 8 November 1994.

⁶⁸ *Präambel* and Rule 2, *Werberichtlinien*, 8 November 1994.

⁶⁹ Article 7(3), RfStV of 26 August 1996.

⁷⁰ Rule 5, *Werberichtlinien*, 8 November 1994.

⁷¹ Article 7(1), RfStV of 26 August 1996.

youngsters and advertisements in which children incite the parents or a third person to buy the goods or services advertised. Advertising must not portray children as sexual objects⁷².

Television advertisements must not feature persons who regularly present news or current political affairs programmes (*Sendungen zum politischen Zeitgeschehen*)⁷³. Finally, advertisements of a political, ideological or religious nature are not allowed⁷⁴.

IV. 4. 2. 2. Frequency of commercial breaks

Advertising must be inserted in blocks and between programmes, and the RfStV exceptionally allows advertising within programmes under certain specified conditions. Blocks are defined in the *Werberichtlinien* as having at least two consecutive spots and they can be inserted at natural programme intervals⁷⁵. The rules apply equally to both public and private broadcasters, and are laid down separately in each section of the *Rundfunkstaatsvertrag* with the same wording⁷⁶. Advertising may only be inserted within programmes where it does not affect the integrity of the programme, and in addition, is subject to certain rules depending on the nature and length of the programme.

IV. 4. 2. 2. a. Public broadcasters

Advertising on public channels in Germany is solely regulated by the RfStV, not by the rules agreed by *Landesmedienanstalten*. Article 14 prohibits the interruption by advertising of children's programmes and religious services. Television advertisements shall be inserted in blocks and between programmes. Some further conditions apply when advertisements are

⁷² Rule 3, *Werberichtlinien*, 8 November 1994.

⁷³ Article 7(6), RfStV of 26 August 1996.

⁷⁴ Article 7(7), *ibid.*

⁷⁵ Rule 10(2), *Werberichtlinien*, 8 November 1994.

inserted within programmes: television programmes of more than forty five minutes duration may be interrupted once by advertisements, a provision which also applies to programmes divided into autonomous parts. In the case of the broadcasting of events containing intervals, advertisements shall only be inserted between the intervals. This rule also applies to sports events which contain intervals.

The RfStV requires that internal codes of practice further interpret these rules on the insertion of advertising⁷⁷. The provisions for television advertising differ little from the rules in the RfStV. Programmes of sport results that last less than forty minutes can also display advertising previously shown in live broadcasts. However, this advertising must be shown at intervals⁷⁸.

IV. 4. 2. 2. b. Private broadcasters

Article 44 of the *Rundfunkstaatsvertrag* subjects private broadcasters to more detailed rules depending on the type and duration of the programme. The *Werberichtlinien* lay down more specific conditions for centre breaks. In general, those programmes consisting of definite parts, or broadcasts of sporting events which incorporate pauses may insert advertising between the individual programme parts or during the pauses. The RfStV does not specify which types of programmes but only mentions “other programmes” (*Bei anderen Sendungen*). Religious services and children’s programmes cannot be interrupted by advertising. Children’s programmes are those mainly targeted at the under fourteen years old,

⁷⁶ Article 14(2) and Article 44(2), RfStV of 26 August 1996.

⁷⁷ Article 16, RfStV of 26 August 1996.

⁷⁸ Teil A, ZDF-Richtlinien für Werbung und Sponsoring of 19 March 1993 amended on 7 October 1994, in *Media Perspektiven Dokumentation*, N°I, 1993; Teil A, ARD-Richtlinien für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring amended on 28 November 1994, in *ARD-Jahrbuch*, 1995, 432.

either by their content or by their scheduled time⁷⁹. News, current political affairs programmes, and programmes with a religious content must be of a minimum of thirty minutes of duration to carry a centre break⁸⁰. However, nothing is said about commercial breaks before or after these programmes.

In programmes consisting of autonomous parts, sport programmes and similarly structured events, and performances with intervals, advertising may only be inserted between the autonomous parts or during the intervals. The breaks must correspond to natural intervals in that specific sport, such as half-time or the end of a game⁸¹.

For films and television movies the rules are the same as in the TWF Directive. Works such as feature films or films made for television, excluding series, serials, light entertainment programmes and documentaries, provided their duration is more than forty five minutes, may be interrupted once for each complete period of forty five minutes. Private channels can have three centre breaks when they are 110 minutes long and thereafter one more break for each subsequent forty five minute part. In all other programmes there must be a separation of at least twenty minutes between centre breaks. A period of twenty minutes must elapse for the centre break to occur in series, soap-operas, chat shows, and games⁸². This particular point has been at the centre of a debate. Article 11(4) of the TWF Directive uses the word “should”, (in German *dürfte*) whereas the German regulator has chosen to use “must” (in German *muß*), implying different levels of obligation. The European Commission considers the twenty minute period as a principle rather than a rule to be enforced to the nearest second⁸³. The TWF Directive only refers to the time which elapses between centre breaks,

⁷⁹ Rule 10(1), *Werberichtlinien*, 8 November 1994.

⁸⁰ Article 44(5), RfStV of 26 August 1996.

⁸¹ Rule 10(1) and (4), *Werberichtlinien*, 8 November 1994.

⁸² Article 44(3) and (4), RfStV of 26 August 1996; Rule 10(5), *Werberichtlinien*, 8 November 1994.

⁸³ Commission of the European Communities (1995) Explanatory Report on the Proposal for a revision of Council Directive 89/552/EEC of 31 May 1995, COM(95) 86 final, OJ C 185 of 19 July 1995.

and that should be twenty minutes. It did not specify to how much time should elapse from the beginning of the programme for the break to occur.

The issue is directly related to the phrase “programmed duration”⁸⁴. Should the time devoted to advertising within the programme be included when calculating programmed duration or not? The gross principle includes this advertising time, therefore making the total duration longer. The net principle only includes the actual length of the film without the advertisements. SAT 1 had been using the gross principle. The Higher Court of Koblenz in 1994 decided then that the RfStV had not taken the TWF Directive’s view but had opted for the CoE Convention’s interpretation⁸⁵. However, until there was a clearer definition at the European level, private broadcasters could interrupt their programmes according to the gross principle⁸⁶. The European Commission understands gross time (i.e. including the duration of advertising spots) as the minimum level required for the purposes of the TWF Directive, but the Member States retain the power to regulate broadcasters within their jurisdiction in a stricter or more detailed fashion⁸⁷.

The issue has not yet been clarified and the confusion of principles remains. In October 1996 the Court of Stuttgart upheld a complaint from the regional ARD member SDR against the commercial channel Pro 7. ARD complained that there had been a case of unfair competition. By using the gross principle, Pro 7 was exerting an unfair influence on the costs of advertising spots⁸⁸. The Court held that the TWF Directive provisions were themselves not

⁸⁴ Anja Bundschuh, VPRT, interview in Bonn, June 1997.

⁸⁵ Article 14(3) in the CoE Convention on Transfrontier Television uses the term “duration” without any further specification, as does the RfStV. The TWF Directive delimits the concept to “programmed duration”.

⁸⁶ *Oberverwaltungsgericht Rheinland-Plafz*, 18 February 1994, 2 B 101185/94, in *ZUM* (1994) May, 306.

⁸⁷ Commission of the European Communities (1995) Report on Application of Directive 89/552/EEC and Proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC, COM(95) 86 final, Brussels, 31 May 1995, 22.

⁸⁸ *Landgericht Stuttgart*, Judgement of 20 October 1996, 17 O 198/196, in *ZUM*, N°1, 1997, 62.

clear about which principle channels should use⁸⁹. If Pro 7 were to take the case further, it would probably win and ARD would have to pay the losses that Pro 7 would incur for using the net principle⁹⁰. The ruling has had no practical result and private channels continue using the gross principle.

RTL was brought before the courts because they treated several films as a “series”, interrupted by four commercial breaks between October 1993 and June 1994. RTL had broadcast thirty four films under the title of “The Great TV Novel” (*Der große TV-Roman*). It argued that the films shown were a “series” and that this allowed it to insert breaks every twenty minutes⁹¹. The Court held that they were separate cinema or television movies, and were subject to the RfStV and the *Werberichtlinien* rules. RTL was fined but appealed to a higher court in Celle⁹². The latter ruled in June 1997 that the private broadcaster had to pay a DM 20.1 million fine (£8.7 million)⁹³.

IV. 4. 2. 3. Prohibited products or those subject to special regulations

All the business sectors or activities that are forbidden either by the Basic Law, by the RfStV, or by general legal dispositions, such as the Law for Protecting the Young, the Penal Code, the Law on Food Products, *Lebensmittelgesetz* (LBMG), or the Law on Pharmaceutical

⁸⁹ “ARD siegt gegen ProSieben im Werbezeit-Streit”, *epd/Kirche und Rundfunk* of 12 October 1996, N°80, 13.

⁹⁰ Steffie Bleil, International Sales, MGM-MediaGruppe, interview in London, November 1996.

⁹¹ Article 44(3), RfStV of 26 August 1996.

⁹² District Court of Hannover, Judgement of 22 August 1996, N° 265-441/95, *Ordnungswidrigkeitengesetz* (Regulatory Offences Act) 23, Js. 44458/95, in *IRIS, legal observations of the European Audio-visual Observatory*, November 1996, 11.

⁹³ “RTL fined for breaking German rules on ads in films”, *Broadcast*, 30 August 1996, 13; “RTL Zuviel Werbung wird hart bestraft”, *Handelsblatt*, Monday 17 June 1997, 1.

Products *Heilmittelwerbegesetz* (HWG), are also banned from advertising on television. Tobacco and tobacco-related products are banned by the LBMG⁹⁴.

Medicines on prescription are formally prohibited from being advertised to the general public in the HWG. They can only be advertised to doctors, dentists, veterinarians, pharmacists and people that deal with these products. The only reference to television is the obligation to include in an advertisement for products that available over the counter without prescription (OTC) a warning to ask for information from the doctor or pharmacist⁹⁵.

Both the public broadcaster's internal rules and the *Werberichtlinien* refer to the self-regulatory Code *Verhaltensregeln des Deutschen Werberates über die Werbung für alkoholische Getränke* (VDW) for the regulation of advertisements of alcoholic drinks regardless of their alcohol content⁹⁶. The VDW lays down content rules for these advertisements. In general, they aim to protect the viewer from misuse of alcoholic products and to protect the young. The VDW also refers to the provisions laid down by the TWF Directive on the advertising of alcoholic drinks⁹⁷. If advertisers breach the Code, the *Landesmedienanstalten* could eventually take powers of sanction.

Other organisations prevented from advertising on television are political parties, and ideological and religious groups. Until 1997 there was no definition of *soziale Appelle* (public service announcements) either in the *Werberichtlinien* or in the RfStV. The new *Werberichtlinien* that will be adopted in Summer 1998 define *soziale Appelle* as broadcasts

⁹⁴ Article 22, *Lebensmittel- und Bedarfsgegenstandesgesetz* (LMBG) of 15 August 1974, BGBl, I, 1945.

⁹⁵ Articles 10(1) and 4(5), *Gesetz über die Werbung auf dem Gebiete des Heilwesens* (HWG) of 20 December 1996, BGBl I, 2084.

⁹⁶ Rule 2(1), *Werberichtlinien*.

⁹⁷ Article 14, Deutsche Werberat (1992) *Verhaltensregeln des Deutschen Werberats über die Werbung für alkoholische Getränke*, Bonn.

in the name of a third party that directly or indirectly advertise for socially responsible behaviour. These broadcasts will not count against advertising limits⁹⁸.

IV. 4. 2. 4. Airtime limits

Airtime limits for television advertising are the same as those stated in the 1989 TWF Directive but the RfStV lays out different rules for public and for private broadcasters:

IV. 4. 2. 4. a Public broadcasters

The regulation of public broadcasters is much more stringent. The RfStV allows ARD and ZDF only twenty minutes of advertising per working day, as an annual average. Up to five minutes advertising time which has not been completely used up may be carried over to another working day. No advertising is allowed on Sundays or national public holidays, and advertising must be broadcast before 20.00 h⁹⁹. The usual times for advertising are from 17.00 h to 20.00 h.

The amount of television spot advertising within a given hour period must not exceed twenty per cent, e.g. twelve minutes¹⁰⁰. Because teleshopping and other direct offers to the public are not allowed on public television, all advertising counts towards the spot advertising limit¹⁰¹. In the discussions preceding the 1996 RfStV amendment, public broadcasters lobbied to eliminate the 20.00 h curfew for television advertising without success. The solution at the political level was to raise the licence fee, and retain the 20.00 h cut-off for television

⁹⁸ Rule 8, *Vorlag für Entwurf zur Änderung der Werberichtlinien*, 22 February 1997.

⁹⁹ Article 15(1), RfStV of 26 August 1996.

¹⁰⁰ Article 15(2), *ibid.*

¹⁰¹ Article 18, RfStV bans advertisements in the form of direct offers or teleshopping on public channels.

advertising. There is now no political will to relax the conditions for the public broadcasters. However, they can, and do, show sponsored programmes after 20.00 h.

IV. 4. 2. 4. b. Private broadcasters

Private broadcasters can advertise seven days a week and on public holidays. The total amount of advertising shall not exceed twenty per cent of broadcasting time. The limit for spot advertising is set at fifteen per cent of daily transmission time and it must not exceed twenty per cent within a given hour¹⁰². Television channels can agree a specific starting point for the hourly limit with the *Landesmedienanstalten*¹⁰³.

At the end of 1995, SAT 1 was threatened on five separate occasions with a heavy fine for exceeding its daily advertising quotas. The Rhineland-Pflaz media authority, responsible for licensing the channel, accused it of exceeding the limit of twelve minutes an hour and of broadcasting up to sixteen minutes per hour. The fine was DM 160,000 (£ 73,000) for every thirty seconds of extra advertising time. By the end of 1996, the channel had been accused of exceeding the legal limits on nine occasions, and it had already been fined twice to pay DM 1.1 million (£400,000). According to a SAT 1 spokesperson, the problem was a “slippage” of centre breaks from an already full advertising hour to the less cluttered one following. The channel argued that it should be allowed to compensate for exceeding its advertising quota in any given hour by carrying less than the limit in the following hour. It showed more live programming than other German channels, and therefore had proportionately more difficulty in scheduling its advertising breaks. SAT 1 also argued that the one-hour periods need not necessarily be calculated to “clock-hour”, but it could choose when the hour started¹⁰⁴.

¹⁰² Article 45(1) and (2), RfStV of 26 August 1996.

¹⁰³ Rule 11(1) and (2), *Werberichtlinien*, 8 November 1994.

IV. 4. 3. Italy

Italy has mainly transposed the provisions in the 1989 TWF Directive into the Mammi Law and subsequent decrees interpreting and supplementing the Law¹⁰⁵. Although the Mammi Law proposed two areas of broadcasting, public and private, the provision for the contents of television advertising is the same for both. These general rules are further detailed for the public broadcaster, RAI, in its internal self-regulatory norms for the broadcasting of advertising¹⁰⁶. The Law specifically set down stricter airtime limits for RAI than for the private broadcasters, and distinguished between national licensees and local broadcasters.

In any case, the Mammi Law did not fully transpose the provisions in the TWF Directive. In particular, it did not transpose the provisions for programmes consisting of autonomous parts other than films and theatrical or musical performances. Sport events, for example, which are only allowed to be interrupted by advertising at the natural intervals in the European text, are not addressed at all in the Mammi Law. The Law did not respect the number of interruptions mentioned in the TWF Directive for films and television movies. The European Commission has several times called this omission to the attention of the Italian government and asked it to fulfil its European duties. The Law gives the *Garante* or regulator and a nominated commission the power to define audio-visual works of high artistic value which must not be interrupted by advertising¹⁰⁷. At the time of writing, the European Commission wanted to take Italy to the European Court of Justice for failure to transpose the TWF Directive as the

¹⁰⁴ "Sat 1 faces fines for exceeding quotas", *New Media Markets*, 21 December 1995, 11.

¹⁰⁵ Law 220 of 6 August 1990, *Disciplina del sistema radiotelevisivo pubblico e privato*, GU 185 of 9 August 1990, (Mammi Law).

¹⁰⁶ SACIS, *Norme per la disciplina del contenuto della pubblicità radiotelevisiva diffusa dalla RAI*, January 1991.

¹⁰⁷ Article 8(4), Law 223 of 6 August 1990.

result of infringement proceedings in 1996 and 1997 for the incorrect transposition of the TWF Directive's provisions for the interruption of programmes for advertising slots¹⁰⁸.

IV. 4. 3. 1. General principles for television advertising

The Mammì Law does not define television advertising, although it refers to it. Chapter II of the Mammì Law on the provisions for broadcasting is divided into three sections: a) General provisions, b) Norms for private broadcasting, and c) Norms for public broadcasting. Article 8 in Section a) lays down the general provisions for advertising and sponsorship. Paragraphs (1) to (5) set out the general principles for the content of television advertising, the number of breaks and the rhythm of interruptions according to the type and duration of the programme.

The first paragraph prohibits all discrimination based on race, sex or nationality. Advertising must not offend viewers' religious or ideological beliefs. Advertising must not induce dangerous behaviour for health, security and the environment, nor must it prejudice minors. It also bans advertising from being inserted in children's animated cartoons. Advertising must be recognisable and separated from programmes either by acoustic or optical means¹⁰⁹.

IV. 4. 3. 2. Products subject to prohibition or special guidelines

The Mammì Law specified the prohibition of television advertising for medicines available only on prescription. At the time there was no express ban on tobacco advertising in the Italian legal system, nor did the Law lay down any special rules for advertising alcoholic drinks, but the self-regulatory code, *Codice dell'Autodisciplina Pubblicitaria* had provided

¹⁰⁸ Commission of the European Communities (1997) Press release IP/97/1154 of 18 December 1997.

¹⁰⁹ Article 8(1) and (2), Law 223 of 6 August 1990.

certain rules on the content of advertisements for alcoholic drinks¹¹⁰. Article 8(5) of the Mammi Law delegated to the Minister of Post and Telecommunications the task of implementing the provisions in Articles 13, 15 and 16 of the Directive by means of a Ministerial Decree.

Accordingly, the Minister issued Decree 425 of 30 November 1991 regulating advertising of tobacco products and alcoholic drinks, and setting the norms for the protection of minors¹¹¹.

Direct or indirect advertising of all tobacco products, or companies whose main activity is the production or selling of these products, is banned. In order to decide which is the main activity of a company, the criterion used is the turnover figure of each single business activity¹¹². Advertisements for alcoholic products should not damage minors, should not induce to alcoholic drink consumption, or establish a relationship between alcohol and physical characteristics such as social or sexual success. It must not establish a connection with driving, nor encourage the belief that this type of drink has therapeutic or stimulant characteristics. Advertisements must show the alcoholic percentage of the advertised drinks¹¹³.

IV. 4. 3. 3. Number and position of commercial breaks

Advertising is allowed in theatre plays, films, opera and music concerts if inserted at the intervals normally carried out in theatres at half way through a performance. For audio-visual works with a programmed duration of more than forty five minutes, a second advertising

¹¹⁰ Article 22, *Codice dell'Autodisciplina Pubblicitaria Italiana*, 25th edition, 30 March 1997.

¹¹¹ Ministerial Decree 425 of 30 November 1991 *regolamento concernente attuazione degli articoli 13, 15 e 16 della Direttiva 89/552/CEE relativi alla pubblicità televisiva dei prodotti del tabacco e delle bevande alcoliche ed alla tutela dei minorenni*, GU 4 of 7 January 1992, 6.

¹¹² Article 1, *ibid.*

¹¹³ Article 2, *ibid.*

break is allowed per half-period. The article does not guarantee, though, that breaks are not inserted when these programmes last less than forty five minutes, as implied in the TWF Directive. Provided that the programmed duration is longer by at least twenty minutes than two or more half-periods or acts of forty five minutes each, a further interruption is allowed¹¹⁴. The article does not exactly transpose the provisions of the TWF Directive for it allows another break apart from the one occurring at a natural interval. A natural break is understood as the interval at cinematographic theatres, for example, or the interval within a theatrical performance. The regime for other centre breaks follows the rules in the TWF Directive. For programmes with a programmed duration over forty five minutes, i.e. one centre break is allowed for each part of the programme. One more break is allowed if the total programmed duration surpasses by at least twenty minutes, two or more single periods of forty five minutes each.

The European Commission's view was that the further interruption of films was contrary to the provisions in the TWF Directive. Private broadcasters, on the other hand, argued that in the TWF Directive, and indeed in Article 8(3) of the Mammi Law, there was the possibility to interrupt films at their interval, as is current practice in cinemas. In 1994, the European Commission argued that the Italian norm did not guarantee that the first interruption occurred after a period of forty five minutes, as already observed. In this debate, the press association FIEG pushed for a more restrictive interpretation of the TWF Directive, allowing only one interruption for films of at least ninety minutes of programmed duration¹¹⁵. In any case, the provisions in the Law for breaks within films did not take effect until January 1993. As mentioned before, the European Commission wanted to take Italy to the European Court of

¹¹⁴ Article 8(3), Law 223 of 6 August 1990.

¹¹⁵ Publitalia'80, Internal marketing brochure, number 5230, quoting the Commission's formal warning to the Italian Republic on 6 April 1994.

Justice for failure to transpose these provisions, after a letter had been sent on 15 January 1996 followed by a reasoned opinion on 7 August 1997¹¹⁶.

In June 1995, the debate about commercial breaks led to a national referendum in Italy on the issue, among others, of advertising within theatrical or cinematographic works. The response to a potential ban on television advertising during films and theatrical works was a clear “no”. The choice the referendum presented was between one centre break per film at the interval (answer yes) and two or three centre breaks, one for each forty five period plus the interval (answer no). The referendum was seen by the Fininvest group as a conscious political effort to destroy Italy’s leading private broadcasting company and protect the public one. It went so far as to say that it was a normative imposition on one person¹¹⁷.

IV. 4. 3. 4. Airtime limits

Article 8 of the Mammi Law determines the following maximum airtime limits for television advertising in relation to the total broadcasting time. For the public broadcaster RAI, the maximum is four per cent of the total weekly broadcasting time, and a maximum of twelve per cent in a given hour¹¹⁸.

For private national television licensees, the daily limit for spot advertising is set at fifteen per cent of the daily broadcasting time, and a maximum of eighteen per cent in any given hour¹¹⁹. Article 8(7) also allowed a supplementary two per cent per hour which must be made up in the preceding or following hour. Decree Law 408/92 later expanded these limits to

¹¹⁶ Commission of the European Communities (1997) Press Release IP/97/1154, op. cit.

¹¹⁷ “*Un passo avanti, due passi indietro, perchè il NO ai referendum sulla legge Mammi*”, promotional brochure published by Gruppo Fininvest in 1995, 5

¹¹⁸ Article 8(6), Law 223 of 6 August 1990.

¹¹⁹ Article 8(7), *ibid.*

include a further five per cent of daily advertising to be dedicated to direct offers to the public, but set the spot limit firmly at fifteen per cent¹²⁰.

For private local television channels, the Law established a maximum of fifteen per cent of the daily broadcasting time and twenty per cent per given hour. A further two per cent within a given hour is allowed to make up for time in the preceding or following hour¹²¹. Again, Decree 409/92 expanded the daily limit to thirty five per cent to include direct offers to the public, but did not differentiate between spot and other forms of advertising¹²². The application of these limits should have become law in 1994. However, another Decree was passed before the limits entered into force. Decree-Law 323/93 modified the maximum daily limit for spot advertising to fifteen per cent¹²³. The hourly limit is more lenient than that for national private broadcasters as the TWF Directive allows national regulators to permit less strict rules when a television channel is only broadcast locally and its signal cannot reach across borders¹²⁴.

IV. 4. 3. 5. The role of self-regulation in Italy

In the second half of the 1980's, lateral agreements were reached between the advertisers association *Utenti Pubblicitari Associati* (UPA), the Advertising Agencies Association ASSAP, and Publitalia'80, the Gruppo Fininvest sales house. These agreements established the foundations for the reduction of advertising clutter in television, and established ways of inserting television advertising more effectively. The agreement was revised in 1995.

¹²⁰ Article 3(9 bis) Decree-Law 408 of 19 October 1992 co-ordinated with conversion Law 483 of 17 December 1992, *Disposizioni urgenti in materia di pubblicità radiotelevisiva*, GU 297 of 18 December 1992.

¹²¹ Article 8(9), Law 223 of 6 August 1990.

¹²² Article 3(1b), Decree-Law 408 of 19 October 1992 co-ordinated with conversion Law 483/92.

¹²³ Article 9(1), Decree-Law 323 of 27 August 1993 co-ordinated with conversion Law 422 of 27 October 1993, GU 253 of 27 October 1993.

¹²⁴ Article 20, Council Directive 89/552/EEC of 3 October 1989, OJ L 298 of 17 October 1989, 23.

Advertising clutter had become an important issue in Italy. On the other hand, the long tradition of self-regulation in Italian television supplements, or even supplants, the lack of effective legal measures¹²⁵. The agreement, regarding the quality of advertising, was understood as being more effective than the provisions in the TWF Directive. Publitalia has agreed to respect the *esclusività merceologica*, or sector exclusivity, in each break: two spots of the same business sector can not be transmitted in the same break. Breaks shall not exceed three minutes except in films and broadcasts of sport events, until a less restrictive norm is adopted by legislators. The number of spots in a single break must not exceed nine, again except in the case of films and sport events. Trailers do not count towards airtime limits. However, their presence in a break considerably increases the time dedicated to the break and, according to the industry, lessens the effectiveness of advertising. In this case, Publitalia agreed not to insert more than two trailers per break, unless the break contains four or less advertisements. Breaks carrying trailers may not exceed forty per cent of the total number of breaks.

There is a separate agreement between RAI's sales house, SIPRA, and the advertising industry, stating conditions for more effective advertising. The public broadcaster will respect sector exclusivity. On average, seventy per cent of breaks will not exceed 180 seconds, with a maximum break duration of 210 seconds, or three and half minutes.

Both agreements are enforced by an undertaking by the respective sales houses to recompense advertisers financially if they infringe it.

¹²⁵ Dott. Pertinelli, AssAP, interview in Milan, June 1996.

IV. 4. 4. Spain

Spain was very reluctant to implement the TWF Directive, and it was not until July 1994 that the Spanish Parliament passed Law 25/94 of 12 July or the Transposition Law¹²⁶. The Spanish legislator decided to concentrate the European provisions in one single law. The first proposals were drafted in 1991 but abandoned because of an anti-regulatory attitude among all parties directly involved¹²⁷.

One of the problems was whether the regulator could establish different regimes for public and private television channels. Under the Spanish system, both public and private channels were financed by advertising. A dual system was not welcomed by the private broadcasters, who already complained of unfair competition, as the public broadcaster enjoyed a double source of revenue. After the discussion of its first proposal with all television channels, the government wanted to adapt the European requirements in a flexible way. The concern for the public broadcaster was that there would only be one law for both private and public television, without distinction. Until this time commercial airtime limits were only regulated by the Law of Private Television whose Article 15 limited television advertising broadcast by licensees to a maximum of ten per cent of annual broadcasting time¹²⁸. The new law allowed for more commercial airtime than the Law of Private Television. In the meantime public broadcaster TVE only had to comply with its internal norms.

¹²⁶ Law 25/1994 of 12 July 1994 implementing Council Directive 89/552/EEC, BOE 166 of 13 July 1994, 22342 (Transposition Law).

¹²⁷ Proposal for a Pre-proposal for the Transposition Law, *Aranzadi Comunidad Europea*, February 1992, 72-74, cited in Martín (1995), *op.cit.*, 355.

¹²⁸ Article 15, Law 10/1988 of 3 May of Private Television, BOE 108 of 5 May 1988.

IV. 4. 4. 1. General principles

The definition of advertising in the Transposition Law was based on the previous 1988 General Law on Advertising (GLA). Television advertising is defined as any form of message broadcast in exchange for payment of any kind, and it restricted it¹²⁹. It incorporated the notion of remuneration into the legal system which was missing in the GLA¹³⁰. The definition excluded trailers, although in a later section, the Transposition Law included trailers within the overall hourly limits¹³¹.

Chapter III of the Transposition Law deals with television advertising and sponsorship. Article 9 defines illicit advertising. The GLA had declared illicit all advertising as misleading and unfair advertising, and subliminal techniques¹³². Other example of illicit advertising also banned in the Transposition Law is advertising which reinforces anti-environmental behaviour or is dangerous to people's health and safety. Advertising shall not damage human dignity, or religious convictions, or discriminate on the grounds of race, sex, birth, religion, nationality, opinion or on other personal or social reasons. Advertising that incites violent behaviour, or cruelty towards persons or animals and the destruction of natural or cultural goods, is also illicit. The law does not specify how it is to be enforced and controlled.

Already banned from television by the GLA, direct or indirect advertising of tobacco products is also prohibited in the Transposition Law. Medicines on prescription are banned from television advertising along with political advertising¹³³.

¹²⁹ Article 3(b), Law 25/1994.

¹³⁰ Article 2, General Law on Advertising 34/1988.

¹³¹ Article 14(2), Law 25/1994.

¹³² Article 3, General Law on Advertising 34/1988; Article 9, Law 25/1994.

¹³³ Article 10(1), Law 25/1994; Article 8(1), General Law on Advertising 34/1988.

Advertising of alcoholic drinks is subject to special rules, following the criteria laid down by the TWF Directive. Previously, the GLA had prohibited television advertising of alcoholic drinks of more than twenty degrees, and it allowed the government eventually to extend the ban to alcoholic drinks of less of twenty degrees¹³⁴. The Transposition Law reaffirmed the criteria in the GLA while adding the guidelines in the TWF Directive for alcohol advertisements¹³⁵. These must not be specifically targeted at minors, nor portray minors consuming these drinks. Advertising must not associate the consumption of alcohol with better physical performance or driving, give the impression that alcohol contributes to social or sexual success, nor suggest that it has therapeutic characteristics. Advertisements must not stimulate immoderate consumption of these drinks, nor give a negative image of abstinence.

IV. 4. 4. 2. Identification and position of breaks

Articles 12 and 13 of the Law on the frequency and position of breaks was the reason for the delay in the adoption of the 1989 TWF Directive by Spanish legislators. Along with airtime limits, they were the subject of heated debate at both political and commercial levels.

The principles of advertising in blocks and the clear separation of advertising from programmes are well transposed. Article 12(1) states that advertising must be clearly identifiable by optical or acoustic means, or both. Accordingly, a mere transcription with the word “advertising” would do to identify the break. Spot advertising (*espacios publicitarios*) shall be inserted in blocks between programmes¹³⁶. Only in exceptional cases can advertisements be broadcast on their own. The Law does not define these exceptional cases thus opening the door to interpretation.

¹³⁴ Article 8(5), General Law on Advertising 34/1988.

¹³⁵ Article 11, Law 25/1994.

Article 13 sets the frequency of interruptions in programmes according to their content and programmed duration. In programmes consisting of autonomous parts which include a natural interval, the break can only occur at the time of the interval. In sport events, the Spanish Law allows captions, superimposed texts or transparencies whenever the game stops. The caption must not exceed one sixth of the screen. Any form of advertising can be inserted in a programmed pause as long as it does not exceed its duration. This particular point refers to intervals such as changeovers between games in tennis, or “time out” in basketball.

Programmes and broadcasts of events that do not have natural intervals are subject to a different rule. A period of at least twenty minutes should elapse between consecutive centre breaks. Exceptionally, and in order to respect the natural interruptions of a programme, on one occasion only this period may be less than twenty minutes but no less than fifteen¹³⁷.

The legislator thus recognised the usual practice among commercial broadcasters of inserting the first centre break just after the opening credits of a programme. The practice may however be damaging for broadcasters since many viewers perceive the total amount of advertising to be more than they are actually prepared to tolerate¹³⁸.

There are also special rules for the insertion of centre breaks in films. Audio-visual works such as feature films whose programmed broadcast duration exceeds forty five minutes may be interrupted once in each complete period of forty five minutes. A further interruption is allowed if the total programmed duration exceeds by at least twenty minutes, two or more complete periods of forty five minutes each. The Spanish Law does not mention TV movies and only opts to regulate interruptions within feature films. The Spanish Government omitted the original reference in its proposal to “films made for television” as a compromise with

¹³⁶ Article 12(2) and (3), Law 25/1994.

¹³⁷ Article 13(2), *ibid*.

commercial broadcasters. The TWF Directive does not allow a lenient interpretation of the insertion rules however, a fact which appears to have been ignored by both the European Commission and the Spanish Government.

Finally, news and informational programmes, documentaries, and religious and children programmes must be of at least thirty minutes of programmed duration to carry centre breaks. Advertising is banned during religious services. Two cases should be identified here: first, no advertising is allowed when these programmes are of a programmed duration of less than thirty minutes; second, when they last for more than thirty minutes, they may follow either the interval rule, or the twenty minute rule. The Spanish Law defines programme duration as the total period of time of the programme, including advertising breaks within it. In this sense, the Spanish legislator has applied the gross principle. The advertising provisions do not apply to direct offers to the public¹³⁹.

Nevertheless, the Law established transition periods to allow certain changes in the rules to be implemented: six months for centre breaks in programmes with natural intervals, and one year for interruptions to films, news and informational programmes (*programas de información*), documentaries, religious and children programmes and other programmes carrying centre breaks¹⁴⁰.

¹³⁸ Antonio Rico, Carat, interview in Madrid, January 1996.

¹³⁹ Article 13, Law 25/1994.

¹⁴⁰ *Disposición derogatoria tercera, Período transitorio para las interrupciones publicitarias*, Law 25/1994.

IV. 4. 4. 3. Airtime limits

Following the 1989 TWF Directive, the Law imposes two types of limits on advertising airtime. Television advertising shall not exceed fifteen per cent of daily broadcasting time¹⁴¹. Time devoted to spots, captions, infomercials, telepromotions or games within programmes all count towards this limit. The Law also allows a further five per cent of daily broadcasting time for direct offers to the public, making a total of twenty per cent. Finally, a second limit establishes the maximum amount dedicated to spot advertising in a natural hour as twelve minutes¹⁴².

The purpose of having both a daily and an hourly limit is to avoid concentrating television advertising at specific times of the day, especially prime-time. Therefore, with a daily maximum, legislators and the TWF Directive aim to spread advertising evenly through the day. Spanish legislators are not clear whether the hourly limit also should include infomercials, telepromotions, games and other forms of advertising, different from both teleshopping spots and regular advertisements. In the meantime, until the Government clarifies its position Spanish broadcasters have only included traditional spots and teleshopping spots.

The definition of “an hour” is crucial for the establishment of the hourly limit. The Spanish Law uses the term “natural hour” and broadcasters have used the term as meaning “clock hour”.

¹⁴¹ Article 14(1), Law 25/1994.

¹⁴² Article 14(2), *ibid.*

Article 14(2) of the Transition Law also established a maximum time for channel trailers. It completes the maximum time of twelve minutes per hour allowed for advertising by stating that under no circumstances shall advertising broadcasting time exceed seventeen minutes, when the breaks include trailers. If the twelve minutes allowed were to be dedicated to spot advertising, there could still be a further five minutes for self-promotion in any natural hour. These five minutes could be more in a natural hour when less than twelve minutes of advertising is broadcast.

In 1993, when the Law was being discussed, the *Dirección General de Telecomunicaciones*, a department of the Ministry of Public Works and Telecommunications had started administrative action against the two main national private channels for breaching the limits on advertising airtime. The Law 10/1988 of Private Television had allowed a maximum of ten per cent of the total broadcasting hours in a year, and a maximum of ten minutes per broadcasting hour¹⁴³. The Transposition Law, which was not passed until July 1994, was more generous to broadcasters. In March 1995, after the Law, the Ministry of Telecommunications imposed a fine of PTAs 10 million (£50,000) on the channels for fifteen infractions between 14 July and 31 August 1994, in which the channels had exceeded the total advertising maximum of twelve minutes in a natural hour¹⁴⁴.

IV. 4. 4. 4. Internal norms for public broadcasters

Although public broadcasters come under the scope of the Law 25/1994, there are also specific rules for advertising on the services of both the State broadcasters and the autonomous regional broadcasters. For some channels these rules are laid down in the law

¹⁴³ Article 15, Law 10/1988 of 3 May of Private Television, BOE 108 of 5 May 1988.

¹⁴⁴ CSA (1996) *Réglementation et regulation audiovisuelles en Espagne*, January, 37.

establishing the specific autonomous channel, and for others they are in the form of internal self-regulation.

The law by which RTVE, the State broadcaster was established, Law 4/1980 of 10 January 1980 (*estatuto de la radio y televisión*) gives the Board of Administration the power to lay down norms on the broadcasting of advertising, making special reference to both the contents and airtime limits¹⁴⁵. TVE still imposes an internal hourly limit of ten minutes, instead of using the twelve minutes allowed by the Law.

In 1990, the Board of Administration of RTVE adopted internal norms for the broadcasting of advertising. At that time, Spain had not yet transposed the TWF Directive, which had been signed at the end of 1989¹⁴⁶. Nevertheless, the norms took on board many of the concepts and provisions in the TWF Directive. The resolution aimed at protecting minors, and laid down strict guidelines on the advertisement of toys and on the participation of children in advertisements¹⁴⁷.

Although already regulated by the GLA, which bans alcoholic drinks stronger than twenty degrees, advertisements for alcoholic drinks also had to respect the criteria in the TWF Directive. They should not be targeted at minors; should not show minors consuming the drinks. They should not associate alcohol consumption with better physical performance, nor with driving vehicles, and they should not give the impression of sexual or social success.

¹⁴⁵ Article 8(1j), Law 4/1980 of 10 January, *estatuto de la radio y televisión*, BOE 11 of 12 January 1980.

¹⁴⁶ *Dirección de Medios de Comunicación Social*, Resolution of 17 April 1990 making public RTVE's advertising admission norms, BOE 155 of 29 June 1990.

¹⁴⁷ Articles 13 to 15, *ibid.*

The RTVE Resolution also required advertisements to display the alcohol strength of drinks of less than twenty degrees¹⁴⁸.

Medicines, financial products, housing and motor vehicles are other product sectors subject to regulations, which are designed to protect viewers¹⁴⁹.

Finally, the Resolution set out the advertising airlimits for the State broadcaster. A maximum of ten minutes could be broadcast per hour, and a daily maximum of fifteen per cent of total broadcasting time was allowed. There was also an annual maximum of ten per cent of total broadcasting time¹⁵⁰. TVE still complies with these limits, acknowledging that, although they could be expanded to the maximum allowed in the Transposition Law, they have a duty as a public broadcaster to restrict the total airtime allowed for advertising. Nevertheless, these rules are only internal self-regulation and could change. The powers of control over these measures lie in the Managing Director of RTVE.

Broadcasters set up by the Autonomous Communities are also subject to the Transposition Law but they can adopt particular measures. The Autonomous Communities' legislators have issued their own norms regulating media advertising interpreting the State Law in more detail¹⁵¹. They establish rules for specific business sectors. The Basque and Galician norms, for example, ban advertisements for guns and violent toys. They also give further detailed guidelines on the participation of children in advertisements, and in the presentation of toys.

¹⁴⁸ Article 16, RTVE Resolution of 17 April 1990; Article 8(5) of General Law on Advertising 34/1988.

¹⁴⁹ Articles 16 to 20, RTVE Resolution of 17 April 1990.

¹⁵⁰ Article 21, RTVE Resolution of 17 April 1990.

¹⁵¹ *Normas reguladoras de emisión de publicidad en los medios de difusión de EITB-RTVV* of 13 September 1983; *Normas reguladoras de emisión de publicidad en los medios de difusión de CC/RTV* of 16 January 1984; *Normas reguladoras de emisión de publicidad en los medios de comunicación de la compañía de Radio-Televisión de Galicia* of 12 May 1986; *Normas reguladoras de Canal Sur* of 28 September 1988; *Normas reguladoras de la emisión de publicidad en los medios de comunicación del*

In Cataluña, advertisements for alcoholic drinks (and tobacco on radio) must be broadcast after 21.30 h.

The maximum airtime allowed for advertising in the Catalan norms is eight minutes per hour, and a maximum of ten per cent of total broadcasting time. The same limits apply for Canal Sur in Andalucía, for TVM in Madrid, and TVV in Valencia. Advertising targeted at children shall not exceed ten per cent a year on average in Cataluña and Valencia. The Basque television norms restrict the hourly maximum to six minutes.

IV. 4. 5. UK

The 1990 Broadcasting Act imposed a statutory duty on the Independent Television Commission. The ITC has adopted several Codes for this purpose. As stated in the forewords to the Codes, the ITC has developed rules on advertising, sponsorship and on the scheduling of advertisements in three separate codes: the ITC Code of Advertising Standards and Practice, the ITC Code of Programme Sponsorship and the ITC Rules on Advertising Breaks¹⁵². The Codes fulfil the requirements for the transposition of the TWF Directive into the UK legal system.

The ITC requires licensees to ensure that operators and producers respect the rules in these Codes. The ITC also regularly supplies notes of guidance to the Codes and it suggests that advertisers seeking guidance approach either the television companies or the Broadcast Advertising Clearing Centre, whose role was analysed in Chapter III of this thesis¹⁵³.

Ente Publico RTVM of 24 May 1989; *Normas reguladoras de emisión de publicidad en los medios de comunicación del Ente Público Radiotelevisión Valenciana* of 22 June 1989.

¹⁵² ITC Code of Advertising Standards and Practice, Summer 1997; ITC Rules on Advertising Breaks, January 1991; ITC Code on Programme Sponsorship, March 1997.

The BBC commercially funded television services uplinked from the UK are required to conform to all relevant ITC Codes¹⁵⁴.

IV. 4. 5. 1. General principles

There is no proper definition in the Codes of television advertising, as there is in the TWF Directive. The “General Principles” section of the Code of Advertising Standards and Practice (CASP) extends its scope to “any item of publicity inserted in breaks in or in between programmes, whether in return for payment or not, including publicity by licensees themselves” and it refers to the term “advertisement” to be so constructed for the purposes of the CASP. The ITC thus includes all self-promotion by the channels under the scope of the CASP.

Rule 5 of the CASP details the ways in which advertising should be made clearly identifiable and separate from the programmes, as does Rule 3.1. of the Rules on Advertising Breaks (RAB). Television advertising must be recognisable as such by optical and/or acoustic means. Section 3 of RAB also sets out the programmes in which television advertising must not be inserted. It bans advertising from religious services, documentaries, news and current affairs programmes, and religious and children programmes of less than thirty minutes scheduled duration. The rule extends the ban to live broadcasts of Parliamentary proceedings and a formal Royal ceremony or occasion¹⁵⁵.

Section 4 of the RAB details the separation of particular advertisements from programmes. Certain categories of advertising are subject to stricter scheduling rules in relation to their proximity to children’s programmes. Condoms, religious advertising, and sanitary protection

¹⁵³ Advertising Guidance Notes, March 1991 re-issued October 1995.

¹⁵⁴ Rule 5 “Commercial relationships”, BBC Producers’ Guidelines, London, November 1996.

(for ITV only), are subject to scheduling restrictions. The principle in Rule 4.1. is the protection of viewers from inappropriate juxtaposition of advertising and programmes, “particularly those which could cause distress or offence to viewers”. Another principle is the particular sensitivity required in advertising around news items that are of a tragic nature¹⁵⁶. Section 7 of the RAB refers to the separation of Long Advertisements and Groups of Advertisements from programmes. Any advertisement longer than one minute should be carefully assessed to ensure that there is no risk of confusion with programme material. These types of advertisements should be identified as such, for example by superimposed text, at the beginning and at the end. Where an advertisement is similar in format to a programme there must be a reminder of its advertising nature¹⁵⁷.

The CASP transposes the bans on tobacco products and medicines on prescription and the criteria for alcohol advertising laid down by the TWF Directive. Advertising of both tobacco products and medicines on prescription is not considered acceptable¹⁵⁸. The tobacco ban had the effect of prohibiting cigar advertisements, and the famous “Hamlet” cigars were to be out of television advertising by 3 October 1991, the date of the enforcement of the TWF Directive. Advertising for matches must not be in or adjacent to children’s programmes¹⁵⁹

Medicines, medical treatment, health claims, nutrition and dietary supplements are regulated in Appendix 3 of the CASP. The guidelines also apply to veterinary products. Over the counter products, (OTC’s), are also strictly regulated. Rule 6 sets out the UK provisions for television advertising of medicinal products for human use required to implement Council

¹⁵⁵ Rule 3.2., ITC Rules on Advertising Breaks, January 1991.

¹⁵⁶ Rules 4.1.1. and 4.1.2., *ibid.*

¹⁵⁷ Rule 7.1.1, 7.1.2. and 7.1.3., *ibid.*

¹⁵⁸ Article 18(v) and Rule 7 (Appendix 3), Code of Advertising Standards and Practice, Summer 1997.

¹⁵⁹ Rule 4.2.5., ITC Rules on Advertising Breaks.

Directive 92/28/EEC of 31 March 1992¹⁶⁰. The four-page Appendix consists of thirty six rules and lists the rules for the advertising of OTC's. Scheduling restrictions also apply for medicines, medical treatments and vitamin supplements targeted to children¹⁶¹. For Lionel Stanbrook of the Advertising Association, television advertising of OTC's in the UK is heavily impaired by such detailed rules. The government has substantially deregulated the sales of OTC's in the last decade. More and more products are being sold now without a prescription, and some of the prescribed products are cheaper if sold over the counter. The future will probably bring more relaxed views on the television advertising rules for these products¹⁶².

In the case of alcoholic drinks the CASP transposed all of the criteria in the TWF Directive. Rule 40 states that advertising for alcoholic drinks must not be targeted at under 18-year olds, and that children must not be seen or heard in advertisements for alcoholic drinks. In advertisements of drinks containing more than 1.2 per cent alcohol by volume, people in the advertisement must be, or appear to be, at least twenty five years old. Advertisements should not feature any characters, real or fictitious, likely to attract the attention of people under eighteen. There should be no suggestion that drinking alcohol leads to social acceptance, or that refusal is a sign of weakness. Suggestions that drinking is essential to social success are not allowed, and advertisements must not suggest that any drink can contribute towards sexual success or that drinking can enhance sexual attractiveness.

Alcohol should not be shown as an essential attribute for masculinity, and should not suggest that solitary drinking is acceptable.

¹⁶⁰ Rule 6, Code of Advertising Standards and Practice, Summer 1997; Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use, OJ L 113 of 30 April 1992.

¹⁶¹ Rules 4.2.7, 4.2.8 and 4.2.13, ITC Rules on Advertising Breaks.

¹⁶² Lionel Stanbrook, Advertising Association, interview in London, December 1995.

Scheduling restrictions also apply to alcoholic drinks. Alcoholic drinks containing 1.2 per cent of alcohol or more by volume must not be advertised on Bank holidays, in or adjacent to children's programmes, or between 16.00 h and 17.45 h except at weekends, nor in live sport or in programmes that are mainly directed at audiences under the age of eighteen, or in religious programmes. Drinks below this limit, and those presented as a low alcohol version of a drink normally containing alcohol, must not be advertised in or around children's programmes¹⁶³. Rule 40 of the CASP lays down the content guidelines for these advertisements.

There was an agreement between the ITC and the spirits companies in which the latter agreed not to advertise on television. The agreement, being a self-regulatory one, was broken by the industry on 1 June 1995. The industry feared an outcry from viewers and the subsequent ban of all alcohol advertising. The voluntary ban dated from the fifties when distillers agreed to keep spirits off television. The advertising industry thinks that the ban had nothing to do with the protection of the viewer but with the fear of vigorous competition, at a time when consumption of spirits was steady. Meanwhile, other types of alcoholic drinks have been advertised freely but subject to the ITC criteria. In 1996, no complaint of substance was upheld against any television advertisement for alcoholic drinks by the ITC¹⁶⁴.

Advertising for children constitutes a separate Appendix to the CASP. Children are considered to be less than fifteen years of age. No product or service which could harm them physically, moral, or mentally, nor exploit their credulity, may be advertised at the time children are viewing¹⁶⁵. Other rules in the Appendix regulate the advertisement of toys, games in children's programmes and other instances of advertising related to children.

¹⁶³ Rules 4.2.1. and 4.2.2., Rules on Advertising Breaks, January 1991.

¹⁶⁴ Advertising Association, Executive Brief on Alcohol Advertising, 12 November 1997.

¹⁶⁵ Rule 1, Appendix 1 "Advertising to children", ITC Code of Advertising Standards and Practice, Summer 1997.

IV. 4. 5. 2. Insertion of breaks within programmes

Both the CASP and the RAB try to limit too frequent advertising and its interference with programmes. The RAB are based on preserving the quality and value of programmes to viewers. Two sets of rules apply, those for terrestrial broadcasters (ITV, TV AM, Channel 4 and Channel 5) are stricter than those for satellite or cable service.

In its Section 5, the RAB transposes the requirements in the TWF Directive on the position and frequency of centre breaks. As a general rule, centre breaks must be placed where the interruption would occur in any case, that is a natural break in the continuity of the programme. In programmes made up of autonomous parts, like magazine format programmes, or sports programmes or similarly structured programmes, breaks may only occur between separate parts. Section 6 gives more detail on the recognition of natural breaks. The Rules give a definition of natural interval, and a detailed list of possible situations for a natural interval to occur within drama, documentaries, magazines and light entertainment programmes, children's programmes, music, sport and programmes with prizes¹⁶⁶.

In programmes not composed of autonomous parts or without natural breaks, a period of twenty minutes should normally elapse between each successive centre break. A shorter interval is allowed where the interests of the viewers are better served by taking the break sooner¹⁶⁷.

¹⁶⁶ Rule 6.1, Rules on Advertising Breaks, January 1991.

¹⁶⁷ Rule 5.4., *ibid.*

Feature films and television movies longer than forty five minutes of scheduled duration may be interrupted once for each complete period of forty five minutes and a further break is allowed when the scheduled duration is at least 110 minutes¹⁶⁸.

The ITC Rules lay down stricter provisions for terrestrial channels concerning the frequency and total duration in breaks within films and television movies. The maximum duration is of three-and-a-half minutes, including all channel promotion¹⁶⁹.

For the UK, the question of programmed duration was not problematic. The ITC chose scheduled duration in the application of its rules. The choice for ITC regulators corresponds to the practical reality of television. Most of the programmes are of around thirty minutes, therefore taking one centre break. The whole structure of commercial television depends on this structure. If programmed duration meant “running time”, programmes would not be able to carry a centre break, since they do not last the full half-hour, but twenty seven or twenty six minutes. The solution would be to increase the running time to thirty minutes, destroying the logic of the programme schedule.

Nevertheless, the British regulator recognises that on certain occasions the scheduled times of breaks could vary according to broadcasting needs. It therefore allows for slight departures from the normal requirements if justified for programming reasons.

Stricter rules apply to terrestrial channels for long advertisements. Rule 7.1.5.(A) bans any advertisement longer than seven minutes duration in these channels, except when approved by the ITC. The rule was amended in 1996 to allow Channel 3, 4 and 5 licensees to aggregate their spot advertising allowance without the prior permission of the ITC between the hours of

¹⁶⁸ Rule 5.3., *ibid*.

¹⁶⁹ Rule 5.6.(A) and 5.7.(A), and Notes to Section 5, *ibid*.

midnight and 6.00 am, to accommodate long form advertisements¹⁷⁰. Advertisements longer than three and a half minutes must not be broadcast between 18.00 h and 23.00 h or between 07.00 h and 09.00 h, times of peak viewing¹⁷¹.

IV. 4. 5. 3. Airtime limits

In the UK, the regulation of advertising airtime limits is two-tiered. For advertising-funded terrestrial channels, the total amount of advertising in any one day must not exceed an average of seven minutes per hour, that is, nearly twelve per cent, with a maximum of 7.5 minutes at peak times. For other services, the total amount of advertising in any one day must not exceed an average of nine minutes per hour, or fifteen per cent of broadcasting, in line with the maximum allowed in the TWF Directive. Transfers of advertising time from one day to another are allowed if necessary, but in no circumstances may the transfers exceed nine minutes per hour. Terrestrial channels should aim to broadcast a maximum of seven minutes per clock hour. In any case, the maximum spot advertising in one clock hour must be no more of twelve minutes. The hourly maximum is only applied then to spot advertising, not to sponsorship or to direct offers to the public, except in their spot form¹⁷².

Non-terrestrial channels may increase the total daily maximum by a further five per cent to include direct offers to the public.

Long advertisements count towards the limits. Airtime for long advertisements of more than three and a half minutes must be drawn from the same clock hour. Since the amendment of the rules on long advertisements for Channels 3, 4 and 5, the consolidation of spot

¹⁷⁰ "ITC amends rules on long advertisements", ITC News release, 53/96, 17 July 1996; see also Chapter VII on Direct Offers to the Public.

¹⁷¹ Sue Eustace, ITVA, interview in London, August 1995.

¹⁷² Section 1, ITC Rules on Advertising Breaks, January 1991.

advertising allowance between midnight and 6.00 am gives a technical maximum of forty two minutes. Licensees will be able to consolidate spot minutage in quantities up to this maximum, retaining any remainder for spot advertising purposes¹⁷³.

¹⁷³ Notes to Editors, "ITC amends rules on long advertisements", ITC News release, 53/96, 17 July 1996.

IV. 5. Conclusions

This chapter has given an overview of the main issues in the implementation of the 1989 TWF Directive's provisions for television advertising. The solutions of the issues at the national level have been diverse, generally responding to local debates and broadcasting practices. National legislators have been able to tackle or raise practical issues effectively addressed by the TWF Directive. Some of the issues were not properly addressed at European level, and they diverged from broadcasting practices and the industry's point of view. In general, the provisions for television advertising have been easily transposed, but some difficulties have appeared. Other issues relate to purely translation problems, as the original draft of the TWF Directive was in French. Translation problems permit different views and opportunities and allow divergent interpretations. Most of the debates about television advertising took place at national level, and pan-European issues dissolve into the national ones.

Provisions on the number and frequency of breaks vary across the five countries depending on the traditions of commercial television and private broadcasting in the country. France chose a restrictive regime for centre breaks in films and audio-visual works, and allows only one interruption in films broadcast by private channels, and no interruption at all on public channels. It also limited the length of centre breaks. Of the five countries studied in the thesis, France is unique in its approach. Other countries have opted to follow the TWF Directive's provisions for centre breaks, with slight adaptations. In Germany, public broadcasters are not specifically required to limit the number of interruptions to films and television movies, but they follow a general rule of one advertising break per forty five minutes of programme. Italy has been more lenient in its adaptation, and allows one more

interruption, thus contradicting the spirit of the provision in the TWF Directive. Spain and UK follow the TWF Directive's provisions.

The question of the inclusion of television-made movies in the TWF Directive has been interpreted in different ways, and some countries have "different Directives". In the case of Spain, the reference to television movies has been omitted. In the UK, the transposition of the TWF Directive forced stricter rules on centre breaks than those previously in existence, where there was no distinction between films and other programmes. The ITC could have followed the CSA in restricting private broadcasters to one centre break within audio-visual works and allowing none to public service channels; or the German example of not allowing advertising after 20.00 h on public channels. However, the ITC chose to limit the duration of the internal breaks.

An important issue for the establishment of the number of centre breaks is the concept of programmed duration. Germany has taken a stricter view by using the "net" criterion. However, a contradiction arises when private broadcasters ignore it, and include the time devoted to advertising when calculating programmed duration. The contradiction is that, although Member States are free to impose stricter rules on broadcasters under their jurisdiction, the German courts have recognised that the issue was not clear at the European level, and until there is further clarification, broadcasters can use the gross principle. Spain includes a definition of programmed duration. Spain also specifically excludes channel promotion from advertising quotas. The UK, on the other hand, specifically includes channel self-promotion in its definition of advertising.

Another issue connected with the frequency of breaks is the possibility of the insertion of advertising within programmes that consist of autonomous parts. The TWF Directive

recognises that advertising could be inserted at the interval, or at the changeover of one autonomous part to the next, provided the break does not disrupt the progress of the programme. The practice has proved to be controversial. In Italy, for example, feature films usually carry an interval, as do theatre performances. The Italian regulator has acknowledged this fact allowing for an interruption within films in addition to those specified in the TWF Directive.

News and current affairs, documentaries, children's programmes and religious programmes cannot be interrupted if their duration is of less than thirty minutes. With the exception of France, the five countries have considered "news and current affairs" in its less strict meaning, that is, news as meaning "hard" news, and current affairs meaning programmes with a political information content.

In calculating the hourly advertising time limit, there are several interpretations of how to measure "an hour". When the hourly advertising allowance is measured by "clock hour", the time is calculated at only one point. In the UK and in Italy this is on the hour (e.g. 10.00 h-11.00 h) while in Germany, for example, the broadcaster can decide at what time the hour will start. France has opted for the sliding hour criterion where advertising time has to comply with the hourly allowance at any point. Obviously, the latter is more limiting for the broadcaster, especially since it is very difficult to manage the length of advertising breaks. Spain refers to a "natural" hour which in practice means a clock hour.

The regulation of advertising content has proved to be controversial. Tobacco has effectively been banned from spot television, and alcoholic drinks are subject to diverse degrees of regulatory severity. The TWF Directive's guidelines did not restrain the alcoholic content. Member States have restricted the alcoholic content at different levels. France prohibits

advertising of alcoholic drinks of more than 1.2 degrees, thus establishing effectively a ban on television advertising of such drinks. The UK bans drinks with 1.2 degrees by volume of alcohol from advertisement in children's programmes, but allows the advertising of alcoholic drinks at other times. Germany and Italy have no restrictions on the basis of alcoholic content, and Spain sets a limit at twenty degrees.

Medicines on prescription are banned across the five Member States, but the issue of advertising medicines in general remains. What does one understand by medicine? Is the concept of medicine the same across the five countries? The UK has opted for the statutory solution and its Codes have laid down specific guidelines for health and food products, setting a further level of regulatory detail. Germany, through its Foodstuffs and Medicines Laws, has opted for the legal solution, and established an extra level of consumer protection. Spain, Italy and France implement the provisions in the Directive on advertising of medicines for human use by means of transposition laws.

The analysis of the issues presented in the chapter shows that in general, the provisions in the TWF Directive for television advertising have been implemented. They follow national underlying agendas and correspond to national debates on the situation of the television market and the relationship that both public and private channels have with their own governments and regulators. At the pan-European level, only the restrictions on content, in particular product categories such as alcohol and children's advertising can actually create barriers of entry and problems in exercising cross-border commercial communications. In particular, the advertising of children's products is not banned in any of the five countries analysed, but is only subject to content restrictions. Advertising in programmes aimed at children is subject to scheduling restrictions in all countries. In Italy animated cartoons cannot be interrupted by advertising.

On the amount and frequency of advertising, the only real problem seems to be the rhythm for the interruption of films, and in particular, of television movies. The key point is that films constitute a main provider of content for broadcasters, especially cable and satellite, and are usually programmed at peak times.

A second observation on the roles played by the European Commission and the European Court of Justice in interpreting the provisions in the TWF Directive. In general, the European Court has played an important clarifying role when the issue affects the working principle of the TWF Directive, that is, the freedom to broadcast across Member States, providing that the country of origin principle is observed: For example national bans on children's advertising or alcohol advertising. But it has also acted on national issues that affect the interpretation of the TWF Directive: for example, the advertising ban on the distribution sector in France, or on the definition of airtime limits for forms of advertising such as direct offers to the public. This particular issue will be analysed in a subsequent chapter. The European Commission has usually acted to clarify provisions raised by national debates, such as the "clock hour" or on programmed duration, or on the time that should elapse between breaks.

The role of European bodies is more clearly illustrated in the interpretation of blurred areas, like sponsorship and direct offers to the public, which are the subject of the next chapters.

CHAPTER V

SPONSORSHIP

V. 1. Introduction

Sponsorship is one of the fastest-growing areas of media communication, both in volume and number of sponsors, as it can be used as a way to reduce the cost of exposure on television. In general, sponsors try to establish a complementary association in the mind of the audience between the programme and their marketing strategies. Sponsorship makes no attempt to advertise, i.e., there is no real message, but it is just there. In advertising terms, programme sponsorship produces low reach but high frequency. This means that although it may only reach a smaller proportion of the audience, they are likely to see it more often¹.

Advertisers are also getting more involved in the production and development of the programmes that they sponsor because of their association with the programme. Sponsors are concerned about their relationship to the content of the sponsored programme, whereas in advertising it is audiences that advertisers seek. The difference between some sponsorship practices and television advertising is difficult to assess, which may seem a contradiction, and sometimes sponsorship could potentially be used to circumvent restrictive regulations on spot advertising.

Some novel forms of commercial communication have developed within the framework of sponsorship regulation. These forms could not be easily assimilated into television advertising because of their special characteristics. In general, they started out in the

¹ Jonas, K. and Levy, C. (1996) "Television Sponsorship in Europe", *Commercial Communications*, Issue 4, September, 11.

sponsorship departments of advertising sales houses, and are regulated within the framework of sponsorship. Regardless of the diverse rules and guidelines at both European and national levels, sponsorship and sponsorship-related practices are found across a great variety of programmes and televised events, ranging from sports, arts and entertainment, to drama, soap-opera and documentaries.

Sponsorship has been subject to debate between commercial and regulatory interests, at both the national and European level. The TWF Directive considers sponsorship as distinct from television advertising. It acknowledged that sponsorship, being different from traditional advertising, should not be considered as part of airtime quotas. Nor when the sponsor is properly identified is sponsorship a circumvention of the ban on surreptitious advertising. The need to differentiate sponsorship from advertising demands clear definitions.

Difficulties have occurred in the implementation of the TWF Directive's provisions across the five Member States. The 1989 TWF Directive clearly categorises sponsorship as a form of commercial revenue by including it in the title of Chapter IV, "Television Advertising and Sponsorship". In doing so, the Council of Ministers recognised sponsorship as a source of finance for television programmes. Television advertising is now a mature business and advertisers are taking advantage of the association between programme and product in new forms of communication such as sponsorship². Therefore, in the view of the European Union, sponsorship is an alternative to subscription or advertising expenditure for the funding of European television.

² *ibid.*

V. 2. Definition

Sponsorship is different from television advertising and other commercial practices, such as product placement, commonly categorised as surreptitious advertising. It is difficult to include in one definition all the practices in which the advertising community and commercial television are involved.

The definitions in both the CoE Convention on Transfrontier Television and the 1989 TWF Directive did not provide for the grey areas which cross the boundary between programme sponsorship and advertising. The CoE Convention, for example, defines sponsorship as:

“The participation of a natural or legal person, who is not engaged in broadcasting activities or in the production of audio-visual works, in the direct or indirect financing of a programme with a view to promoting the name, trademark or image of that person”.³

The general principles governing sponsorship were stated in Article 17 of the CoE Convention, i.e. that sponsored programmes must be clearly identified as such, and that the broadcaster retains full responsibility over the content and scheduling of the sponsored programme. The CoE Convention also excluded any promotion of the sponsor’s product or service during the sponsored programme.

The TWF Directive, on the other hand, defines sponsorship as:

“Any contribution made by a public or private undertaking not engaged in television broadcasting activities or in the production of audio-visual works, to the financing of television programmes with a view to promoting its name, its trademark, its image, its activities or its products”.⁴

³ Article 2(g), Council of Europe European Convention on Transfrontier Television and Explanatory Report to the Convention, Strasbourg, 5 May 1989, STE N°132.

⁴ Article 1(d), Council Directive 89/552/EEC of 3 October 1989, OJ L 298 of 17 October 1989, 23.

This latter definition includes the promotion of the sponsor's products or activities as an intrinsic aim of sponsorship of a television programme, whereas the definition in the CoE Convention does not.

In 1991, the CoE report on programme sponsorship tried to research these new practices which qualify as sponsorship and which are borderline between sponsorship and advertising⁵. It described the wide variety of practices which could be included in each concept, and the diverse regulatory forms in different countries concerning the conditions under which programme sponsorship may take place. At that time, not all Parties had made provisions on all aspects of sponsorship⁶.

Similarly, just by implementing the provisions in the TWF Directive, not all five of the Member States studied here have covered all problematic areas. A grey area is product placement, which is generally considered to be surreptitious advertising or surreptitious sponsorship. Rules on the presentation of prizes in game shows and competitions are often found under sponsorship provisions but relate to product placement. Infomercials and telepromotions are usually considered to be similar to advertising when they do not include a direct offer to buy, but when they do, they are assimilated to teleshopping. Finally, the sponsorship of sporting and other events broadcast by television is one of the most difficult regulatory issues at the moment, because of the value of the rights involved. These grey areas show that the definition of sponsorship does not provide for the reality of television sponsorship practices.

The definition in the TWF Directive establishes two criteria: First, the sponsor's participation in direct or indirect financing, including contributions to the direct costs of the programme

⁵ Council of Europe (1991) Programme sponsorship and new forms of commercial promotion on television, *Mass Media Files N°9*, Strasbourg.

and the supply of equipment or prizes for game shows; second, the presence or promotion of the sponsor. The criteria seek to make the distinction between advertising and sponsorship very clear. In the latter, it is the sponsor's name, activities or trademarks, but without any direct invitation to purchase or sell which is generally promoted. To ensure that the co-producer of an audio-visual work or television programme is not confused with the sponsor, the definition excludes companies engaged in television broadcasting activities or in the production of audio-visual works⁷.

One of the crucial differences to advertising is the way in which the income obtained from each activity is allocated. Receipts from advertising usually go to the broadcaster's general budget, whereas sponsorship income is allocated to the specific programme budget⁸.

It is often broadcasters who approach the sponsors to sell them the sponsorship of programmes. The sponsor purchase the right to mention its name or trademark in the credits of the programme concerned, in order to promote its general image but not to sell its products or services. Co-operation between the broadcaster and the advertisers is becoming closer. In the sponsorship of programme production the sponsor usually produces, with different degrees of involvement, a programme considered suitable for their marketing objectives. In return, the sponsor's name or logo, or trademarks, appear in the programme credits. This point takes us to the next issue of discussion.

⁶ *ibid.*, paragraph 116.

⁷ The CoE Convention on Transfrontier Television also established these criteria; EBU (1990) "Commentary on the "Television without Frontiers" Directive and the European Convention on Transfrontier Television", *EBU Review, Programmes, Administration, Law*, Vol. XLI, N° 4, July, 10.

⁸ CoE (1991) *Mass Media Files N° 9*, *op. cit.*, paragraph 11.

V. 3. Areas of discussion

V. 3. 1. Editorial freedom of broadcasters

Article 17 of the TWF Directive lays down general principles on sponsorship, very similar to those stated in the CoE Convention.

“1. Sponsored television programmes shall meet the following requirements:

- (a) the content and scheduling of sponsored programmes may in no circumstances be influenced by the sponsor in such a way as to affect the responsibility and editorial independence of the broadcaster in respect of programmes;
- (b) they must be clearly identified as such by the name and/or logo of the sponsor at the beginning and/or the end of the programmes;
- (c) they must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services.

2. Television programmes may not be sponsored by natural or legal persons whose principal activity is the manufacture or sale of products, or the provision of services, the advertising of which is prohibited by Article 13 or 14.

3. News and current affairs programmes may not be sponsored”.⁹

The first issue is how to safeguard the editorial independence of broadcasters from a sponsor’s influence. Article 17(1a) tries to ensure the editorial freedom of broadcasters from advertisers’ interests by requiring that broadcasters retain the editorial control of the programme.

The influence of advertisers may lie in the production of programmes related to the sponsor’s product category. The synergy between the programme and the company’s image may be exploited further by the sponsor to sell its products. Article 17(1a) is not clear how the potential connection between the economic activity of the sponsor and the programme content may occur. The issue has been interpreted differently by Member States. The UK

⁹ Article 17, Council Directive 89/552/EEC of 3 October 1989.

used to prohibit a company from sponsoring a programme if it had a direct interest in the content of that programme. In the 1997 version, the ITC's Code of Programme Sponsorship relaxed the rules for "how to do" programmes. These types of programmes are instructional and do not include purchasing advice or reviews. They can therefore be sponsored by an advertiser who supplies products or services relevant to the area of interest concerned. For example, a food manufacturer may now sponsor a cooking programme¹⁰.

Another attempt to safeguard the broadcaster's editorial freedom is laid down in Article 17(3), which bans news and current affairs programmes from being sponsored. As explained in the previous chapter, current affairs or soft news programmes are magazines strictly devoted to current events, such as news comment and analysis and political statements on current events¹¹. The definition of news by the commercial sector is usually a strict one, that is, only "hard" news, i.e. newscasts, would be banned from sponsorship. On the other hand, programmes like the weather forecast, or the stock exchange and traffic reports could easily be sponsored.

A sponsor may either provide the programme, *barter* it, or be associated with the funding of a programme from the moment it is conceived. Bartering occurs when an advertiser supplies ready-made programmes to a television channel in exchange for advertising time, instead of money. In this case, the sponsor "underwrites" the programme. In a barter transaction, the broadcaster usually retains technical and artistic independence from the sponsor in scheduling. The main objective of bartering is to acquire advertising time in exchange, but is similar to sponsorship in form: the advertiser's name appears in the credits or has a potential influence on the content¹².

¹⁰ Article 7.1., ITC Code of Programme Sponsorship, March 1997.

¹¹ EBU (1990) "Commentary on the "Television without Frontiers" Directive and the European Convention on Transfrontier Television", op. cit.

¹² CoE (1991) *Mass Media Files N°9*, op.cit., paragraph 14.

For advertisers and advertising agencies, bartering represents a means to obtain advertising time more cheaply than buying it directly. For broadcasters and the public, bartering could be a means to increase the number of programmes available. There is a danger that broadcasters may lose editorial independence, as the programme rights belong to the production company. It also means the constant presence of the advertiser within the programme, which could annoy the audience¹³. It would also be desirable if the public were to be informed of the transaction.

V. 3. 2. Identification of the sponsor

The rationale behind Article 17(1b) of the TWF Directive is that viewers must be informed that a programme has been financed by a given company, and be able to judge its contents accordingly, a requirement similar to that for spot advertising¹⁴. The viewer should be able to distinguish clearly between a programme and a commercial communication. The rules for identifying the sponsor by its name/logo at the beginning and or at the end of the programme show the TWF Directive's commitment to transparency in the relationship between broadcaster and advertiser. At the same time, the identification requirement shows the will to protect the viewer from surreptitious commercial messages. One of the problems lies precisely in the way in which the sponsor should be identified. The scope of the sponsor's logo or name varies from country to country. The logo is not the only way to identify the sponsor, but the title, company brands and business activity may also be used. The term "logo" must be interpreted as the sign that is most commonly used to designate the sponsor and, in any case, this should not be the representations of its products or services, or even its symbol or slogan, which would constitute advertising.

¹³ *ibid.*, paragraph 55.

The European Commission considered that the provision requiring sponsored programmes to be clearly identified as such at their beginning and end, did not mean that the sponsor's name or logo could not be mentioned during the programme, and the Member States retained the power to regulate broadcasters within the jurisdiction in a stricter fashion¹⁵. It should be understood as a minimum identification requirement. Further credits could be permitted in the advertising breaks or in combination with trailers. In the Association of Commercial Television's view, the rule permits references to the sponsor inside the programme on condition that these are unobtrusive, short and do not disturb the continuity of the programme¹⁶.

In the RTI case, the ECJ was required to address, among others, the interpretation of the rules on sponsor identification laid down in Article 17(1b) of the TWF Directive. The wording of the article itself did not restrict reference to the sponsor only in the credits. So, even if Article 17(1b) does not prohibit the mention of the sponsor's name or logo during a programme, Member States may impose stricter rules provided that they do not infringe the freedom to provide services and the movement of goods, as provided in Article 3(1) of the 1989 TWF Directive¹⁷.

This particular judgement opens up the question as to what is meant by "stricter" rules on sponsorship. More sponsor credits mean more sponsor presence. The TWF Directive requirement is understood to be a minimum requirement for identification purposes.

¹⁴ Association of Commercial Television, "Comments and position on the revision of the *Television without Frontiers* Directive 89/552/EEC", Brussels, 17 February 1995, mimeo.

¹⁵ Commission of the European Communities (1995) Report on application of Directive 89/552/EEC, COM(95) 86 final, Brussels, 31 May 1995, 22.

¹⁶ Letter to G. Paulger, DG X, from Sinoué Wade, ACT, on the revision of the TWF Directive, Brussels, 27 March 1995.

¹⁷ ECJ, Judgement of 12 December 1996 in Joined Cases C-320, 328, 329, 337, 338 and 339/94, *Reti Televisive Italiane v Ministero delle Poste e Telecomunicazioni*, 1996 ECR, I-6471.

However, there is an ambiguity. The minimum level may be sufficient for the sponsor to be identified, therefore any further sponsor credits can be considered to be superfluous identification. But, although the minimum may be the minimum necessary level, more sponsor credits would make the sponsorship even clearer to the viewer. The ambiguity leads to different national interpretation of what level of identification is necessary or desirable.

A second question that arises is whether it is possible for the sponsor to place a spot advertisement at a centre break within the sponsored programme, and whether the spot would be considered to be a reference to the sponsor within programmes.

V. 3. 3. Sponsorship and the protection of viewers

Article 17(2) ensures that those product categories banned from television advertising do not get around the prohibition by using sponsorship. This applies to manufacturers of tobacco products and to medicines only available on prescription. Article 17(2) prevents sponsorship by companies whose main activity is the production of those banned products. *A contrario*, sponsorship is possible by anyone or any company whose main activity falls outside the scope of Article 17(2), for example, alcoholic drinks.

Children's programmes are not banned from being sponsored in the TWF Directive. However, several Member States have opted for a stricter position, and banned sponsorship with the aim of the protection of minors of children's programmes, or of animated cartoons aimed at children.

The definition of "principal activity" is generally understood to be that which the public associates with the company, or that which generates the most turnover. The European

Commission found that where this particular activity does not exceed forty nine per cent of total operations this prohibition created unfair competition vis-à-vis other companies. Its point of view is based on the notion that “unlike tobacco companies, whose name is often associated with their products the companies targeted by this measure are not generally associated in the public’s mind with a particular pharmaceutical product”¹⁸. The revised 1997 TWF Directive has amended this particular issue and specifically bans sponsorship by those companies whose main activity is the production or sale of cigarettes and other tobacco products. On the other hand, it allows the sponsorship of programmes by companies whose activities include the production or the sale of medicines or medicinal treatments. In this case, sponsorship may promote their name or corporate image, but may not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the broadcaster falls¹⁹.

V. 3. 4. Sponsorship v advertising

Article 17(1c) of the TWF Directive requires that sponsors do not encourage the purchase of their products, through the content of the sponsorship message. This requirement is intended to reinforce the distinction between advertising and sponsorship in the viewer’s mind, as well as to prevent the sponsor from benefiting from the lack of airtime restrictions in order to deploy another form of advertising. Finally, sponsorship is not subject to airtime allowances.

The TWF Directive does not prevent the sponsor from buying airtime within or adjacent to the sponsored programme, but Member States such as Germany and UK have laid down

¹⁸ Commission of the European Communities (1995) Report on the Application of Council Directive 89/552/EEC, *op.cit.*, 40.

¹⁹ Article 17, European Parliament and Council Directive of 30 June 1997 amending Directive 89/552/EEC, OJ L 202 of 30 July 1997.

specific rules to prevent it, especially around children's programmes, or around other programmes with "sensitive" content, such as soft news or current affairs.

There are issues that do not belong either to the sponsorship or advertising categories. There is no reference in the TWF Directive to other forms of sponsorship, such as advertiser supplied programmes or barter. Particularly interesting are the ways in which national regulators have resolved the issue of sponsor promotion within sponsored programmes, especially the presence or intentional display of products, both by sponsors and other advertisers. In general, it seems that regulators understand that this presence, when it is not clearly credited, is surreptitious advertising or surreptitious sponsorship. The issue will be studied in Chapter VI. However, the extent to which editorial content of the programme is compromised by accepting advertisers' finance of any sort is precisely the regulatory issue.

V. 4. National interpretations

V. 4. 1. France

V. 4. 1. 1. The road to the implementation of the TWF Directive

According to Hurard, the regulation of sponsorship in France represents one of the longest legal projects in French audio-visual law²⁰. Sponsorship was mentioned for the first time in the 1986 *Cahiers des Charges* of Canal Plus. The licensee was authorised to receive contributions from companies wanting to finance programmes with the aim of promoting their image or activities, using their name or denomination. In 1985, the *Haute Autorité de la Communication Audiovisuelle*, the regulatory body at the time, had previously laid down certain provisions in the field of co-productions and the sponsorship of events, but it was not until Law 86-1067 of 30 September that sponsorship was recognised as a legal practice. The Law delegated to the CNCL the power to determine the conditions under which public broadcasters could sponsor certain programmes mainly those with an educational, cultural and social mission²¹. These CNCL provisions are stated in the public broadcasters' *Cahiers des missions et des charges*.

The Law also established that the general principles governing advertising for private broadcasters would be laid down by means of Decrees²². Decree 87-37 of 26 January 1987 was issued to fulfil this requirement²³. It set the minimum guidelines for programme

²⁰ François Hurard (1995) "La publicité audiovisuelle", in *Droit de l'Audiovisuel*, Gavalda and Piaskowski (eds.), Paris:LAMY, 738.

²¹ Articles 27 and 48, Law 86-1067 of 30 September 1986 on the freedom of communication, amended.

²² Article 48(3), *ibid.*

²³ Decree 87-37 of 26 January 1987 applying Article 27(1) of Law 86-1067 on the freedom of communication and fixing the rules on advertising and sponsorship for certain television services, JO of 27 January 1987, 946.

sponsorship according to content. Regulators were already concerned about the exclusion from editorial independence of the broadcaster in sponsored programmes over which the broadcaster did not have total control, especially in programmes promoting the sponsor's products or services.

This first Decree was complemented by a second decree, Decree 87-239, and several decisions by the CNCL²⁴. French broadcasters challenged the regulatory powers of the CNCL, later the CSA, over the matter. Although Law 89-25 of 17 January 1989 confirmed the powers of the regulatory body to interpret and control the rules, the *Conseil Constitutionnel* declared the provision unconstitutional on the same day, on the grounds that the extension of the CSA's powers was too wide²⁵. Sponsorship disappeared *tout court* from the legal texts as a result.

As a result of the legal void, the CSA had to intervene in its interpretative role. In July 1990, having already issued several warnings to private broadcasters, the CSA again addressed a circular letter to them interpreting in detail the sponsorship rules in Decree 87-37. The circular helped to identify advertising practices which were incompatible with the CSA's interpretations, such as product placement, references to advertising material in the sponsor's credits, references to the sponsor by programme presenters, or a reference which is neither punctual (*ponctuelle*) nor unobtrusive (*discrète*). In its letter the CSA qualified "punctual" as not longer than five seconds and references had to be at least ten minutes apart. Under no circumstances could the sponsors' products be shown even in stylised form. However, the circular reminded private broadcasters that the sponsors' products could be shown in game

²⁴ Decree 87-239 of 6 April 1987 regulating advertising and sponsorship for private television, JO of 7 April 1987, 3874; CNCL Decision 87-327 of 7 December 1987 on sponsorship regulation applicable to public broadcasters, JO of 9 December 1987, 14330; CNCL Recommendation of 7 December 1987 on sponsorship rules applicable to private broadcasters, JO of 9 December 1987, 14331.

shows and viewers' competition programmes. This circular allowed the regulatory authority to impose sanctions on broadcasters which infringed the regulations, for example, both TF1 and M6 were fined for giving undue prominence to the sponsor²⁶.

V. 4. 1. 2. The regulation of sponsorship

The adoption of the 1989 TWF Directive led to an update in the sponsorship regulation. Decree 92-280 of 27 March 1992 unifies the rules on sponsorship for public and private broadcasters. Cable channels were also covered²⁷. This Decree implements the provisions of Articles 17 to 20 of TWF Directive on advertising and sponsorship²⁸. It introduced three new provisions in relation to previous texts. First, any legal person can sponsor programmes; second, activity sectors banned from television advertising are also banned from sponsorship; and third, news and programmes with a political information content cannot be sponsored. The Decree also lays down the general principles regulating sponsorship, including provisions to safeguard the editorial independence of broadcasters, the differentiation of sponsorship from advertising, and the transparency of the nature of the relationship.

Sponsorship is defined as any contribution by a company or person, not involved in television broadcasting or audio-visual production, to the funding of television programmes, which aims to promote its name, its trademark, its image, its activities or products (*réalisations*)²⁹. The Decree only seems to affect the sponsorship of programmes, *émissions*, i.e. features with beginning and end credits, even short ones. It seems to imply that a

²⁵ Law 89-25 of 17 January 1989 modifying Law 86-1067; Judgement 88-248 DC of 17 January 1989, *Conséil Constitutionnel*, quoted in Serge Robillard (1995) *Television in Europe: Regulatory Bodies*, EIM Media Monograph N°19, London:Libbey, 63.

²⁶ CSA, circular letter to private broadcasters of 23 July 1990, quoted in François Hurard (1995) *op. cit.*, 741.

²⁷ Article 10, Decree 92-882 of 1 September 1992 modified by Decree 95-77 of 24 January 1995 on cable television and radio services, JO 25 January 1995, 1339.

²⁸ Decree 92-280 of 27 March 1992, JO 28 March 1992, 4313.

minimum of editorial engagement on the broadcaster's side is required for a programme to be sponsored, for example, a sponsor cannot sponsor a trailer for a programme³⁰.

V. 4. 1. 2. a. Identification and presence of the sponsor within the sponsored programme

The scheduling and content of sponsored programmes must not be influenced by the sponsor so as to damage the licensee's editorial independence and responsibility. This implies that programme sponsorship is sold to advertisers in the form of credits or trailers. In practice, it is impossible to conceive a programme around the sponsor's commercial interests³¹. Sponsored programmes should not incite the purchase of the sponsor's products, therefore no promotional reference to them nor to the sponsor's advertising slogan is allowed³².

Sponsored programmes must be clearly identified as such at the beginning or the end of the programme. The sponsor's name may be mentioned in centre breaks and in trailers on condition that it does not exceed the time allowed, is unobtrusive and the reference remains within the allowed identification signs, following the criteria laid down by the CSA in 1990³³.

The sponsor may be identified by name, activity sector, trademarks, or by images (*facteurs d'image*), and other distinctive signs usually associated with it, such as its logo, its initials or an audio jingle, provided there is no advertising slogan or product presentation³⁴. The ban on product representations and their characteristics is regarded by broadcasters as being very

²⁹ Article 17, *ibid.*

³⁰ TF 1, *Code d'utilisation du décret sur le parrainage*, internal brochure, 1996, 3.

³¹ Article 18(I), Decree 92-280.

³² Article 18(II), *ibid.*

³³ Article 18(IV), *ibid.*

³⁴ Article 18(III), *ibid.*

strict³⁵. Commercial practices have found ways of circumventing this total ban, by recurring representations of the sponsor's economic environment. Examples are the animation of a logo on a wooden background for a furniture manufacturer, water reflections for swimming-pool manufacturers, or racing cars for tyre manufacturers.

Broadcasters and regulators have been at odds over whether certain forms of sponsor identification may be considered to be advertising or even an invitation to buy. Since the Decree was enacted, the sponsor may be identified by a character historically associated with the company, such as the Bibendum puppet for Michelin. In principle, a slogan carrying a product characteristic is unacceptable, unless the sponsor can demonstrate its institutionalisation, for example, its registration as industrial property³⁶.

V. 4. 1. 2. b. Prohibited sponsorship

Article 19 bans those companies whose main activity is the production or the sale of alcoholic drinks, tobacco products and medicines and medical treatments available only on prescription, imposing stricter restrictions than those in the TWF Directive. Finally, Article 20 bans the sponsorship of news programmes and programmes with a political information content. The ban does not affect programmes with a general information content or of sport information³⁷. Sponsorship is, however, heavily used by the press and the distribution sectors, which are prevented from television advertising³⁸.

³⁵ Edouard Boccon-Gibod, TF1, interview in Paris, June 1996; TF1, *Code d'utilisation du décret sur le parrainage*, 1996, 10.

³⁶ Article 19, Decree 92-280.

³⁷ Article 20, *ibid.*

³⁸ CSA (1996) *Réglementation et régulation audiovisuelles en France*, January, 95.

V. 4. 1. 2. c. Practical difficulties

In 1995, the CSA sent a letter to all broadcasters reminding them of the rules for the collaboration between the press and television³⁹. It allowed the press to sponsor television programmes under the conditions in Decree 92-280. The press can sponsor a programme about the publication's business sector without attempting to infringe the broadcaster's editorial freedom. The collaboration between both media can also take the form of a co-production. In that case, particular attention should be paid to safeguarding the broadcaster's editorial freedom. If the collaboration is in the form of association, it should be mentioned in the credits, so that the public is clear about who is the programme sponsor. The front page of the publication must not be shown on screen unless it is editorially necessary⁴⁰.

Most of the sanctions imposed by the CSA fall under the ban on the promotion, purchase or sale of the sponsor's products, or relate to references that are neither punctual nor unobtrusive. These cases will be considered in Chapter VI on Surreptitious Advertising, but those sanctions were also often in connection with other infringements, for example, against the ban on certain activity sectors from television advertising. On 13 January 1995, TF 1 was fined FF 4,980,000 (£632,542) for failing to include in the credit titles the name of the programme sponsor, *Tiercé Magazine*, which had been quoted in the programme⁴¹.

³⁹ "The CSA circularises television programme producers on illegal indirect advertising", *IRIS*, Vol. I, N°9, October 1995, 11; For further discussion see Chapter VI on Surreptitious Advertising.

⁴⁰ CSA (1995) "*Rapports Presse/Télévision et émissions de jeu ou de concours: le CSA écrit aux chaînes*", *Lettre du CSA*, N°71, August, 11.

⁴¹ "France: TF 1 fined for failing to keep to standards laid down for sponsorship", *IRIS*, Vol. I, N°3, March 1995, 9.

V. 4. 2. Germany

V. 4. 2. 1. The regulation of sponsorship

Sponsorship is recognised by the *Rundfunkstaatsvertrag* (RfStV) of 31 August 1991 and its successive amendments, as an independent source of funding for broadcasters, additional to advertising.

Article 8 of the RfStV defines sponsorship as the direct or indirect financial contribution to a programme with the purpose of promoting the sponsor's name, trademark, image, activities or services. The sponsor must not be engaged in broadcasting activities or in the production of audio-visual works⁴².

The fact that a programme has been partially or wholly sponsored must be acknowledged at the beginning and end of the programme with a short credit. This reference may be in the form of superimposed text or transparencies. The company logo may be faded in, in addition to or instead of, the sponsor's name⁴³. However, the editorial independence of broadcasters has to be preserved. Furthermore, Article 8(3) states that the content and scheduling of a sponsored programme shall not be influenced by the sponsor in such a way as to prejudice the broadcaster's responsibility and editorial independence. Article 8(4) requires sponsored programmes not to encourage the sale or promotion of the sponsor's products or services by making special promotional references to them.

Any person who is not allowed under the RfStV or other statutory provisions to advertise, or who is mainly involved in the manufacture or sale of products, or is a provider of services,

⁴² Article 8(1), RfStV of 26 August 1996, in *MediaPerspektiven Dokumentation*, I/1996.

⁴³ Article 8(2), RfStV of 26 August 1996.

banned from advertising, for example tobacco products and medicines on prescription, must not sponsor programmes. News and programmes on current political affairs (*Sendungen zum politischen Zeitgeschehen*) cannot be sponsored⁴⁴. There is no specific reference to the sponsorship by manufacturers of alcoholic beverages.

Although the RfStV establishes a dual system of television regulation, public and private, sponsorship regulation covers both systems. Both categories of broadcasters are allowed to transmit sponsored programmes provided they comply with the general rules in Article 8 of the RfStV.

V. 4. 2. 2. Public broadcasters

ZDF and ARD have translated the RfStV requirements into their own internal codes of practice. Sections 6, 7 and 8, regulate programme sponsorship, the sponsorship of broadcast events, and the sponsorship of foreign programmes⁴⁵.

The sponsor must not influence either the contents or the scheduling of programmes in any way. The programmes must not incite the viewer to purchase, to sell or to rent the sponsor's products or services. Political, religious or ideological associations are not allowed to sponsor programmes. Manufacturers or providers of goods and services which are banned from advertising cannot sponsor programmes. This ban affects tobacco products and medicines on prescription. Public broadcasters refer to the guidelines in the *Deutsche Werberat* for the advertising of alcoholic drinks, but nothing is said about sponsorship. Newscasts and current political affairs programmes cannot be sponsored. The sponsor has to

⁴⁴ Article 8(5) and (6), RfStV of 26 August 1996.

⁴⁵ Articles 6, 7 and 8, ZDF-Richtlinien für Werbung und Sponsoring, 7 October 1994, in *MediaPerspektiven Dokumentation*, N° I, 1993; ARD-Richtlinien für die Werbung, zur Durchführung

be identified at the beginning and at the end of the programme, by using the sponsor's name, its company name, its logo or a product's trademark. This reference shall be reasonably brief even when using superimposed text or transparencies. Sponsorship may be interrupted by advertising breaks under the rules established for this case⁴⁶. For ARD, the decision to sponsor programmes must be ratified by the *Fernsehprogrammkonferenz*, the internal body of control⁴⁷.

When broadcasting sponsored events, both ARD and ZDF require that the sponsor or sponsors of the event do not exert influence over the broadcast, and must not be mentioned in the credits. The content of the programme must not be connected with the sponsor of the event, and those sponsor references unavoidable by the broadcaster, must be kept to a minimum⁴⁸. The same rules for the safeguard of editorial independence and the sponsor identification apply to broadcasts of foreign sponsored programmes.

V. 4. 2. 3. Private broadcasters

Private broadcasters are subject to further rules or *Werberichtlinien* issued by the Conference of Directors of the *Landesmedienanstalten*⁴⁹. These *Werberichtlinien* exempt sponsorship from complying with the rules on the form and content of advertising laid down in Article 7 of the RfStV, and from the airtime limits set in Article 45(1) and (2) of the RfStV. The *Werberichtlinien* allow the sponsorship of short programmes or autonomous sections, such as the weather forecast, but they forbid the sponsorship of advertising features, such as spot

der Trennung von Werbung und Programm und für das Sponsoring, 28 November 1994, in *ARD-Jahrbuch*, 1995, 432.

⁴⁶ Rules 6.3, 6.6, 6.7 and 6.8, *ARD-Richtlinien* of 28 November 1994 and *ZDF-Richtlinien* of 7 October 1994.

⁴⁷ Rule 6.10, *ARD-Richtlinien* of 28 November 1994.

⁴⁸ Section 7, *ARD-Richtlinien* of 28 November 1994 and of *ZDF-Richtlinien* of 7 October 1994.

advertisements, long advertisements or teleshopping. The rules allow a sponsor to insert its logo or its product name or trademark which may take the form of a transparency or superimposed text. The sponsor credits must be broadcast at the beginning and at the end of the programme, but from late 1998 credits can also be broadcast before and after advertising breaks⁵⁰. Neither the RfStV nor the *Werberichtlinien* state the required duration for credits, but they may last long enough to make the sponsor's financial contribution clear. Commercial practice sets this duration around five to seven seconds. Slogans or parts of advertisements are not allowed on sponsor credits.

A sponsored programme may incite the purchase, sale or rental of the sponsor or a third party's products or services when these are presented within the programme in a preferential manner. In the broadcast of sport events or cultural manifestations, a programme is banned if it is likely to promote the purchase, sale or rental of the sponsor's, or a third party's, products and services when they are prominently displayed on billboards or posters. Nor must the sponsor be mentioned in the credits of broadcast sponsored events⁵¹. Finally, trailers cannot be sponsored⁵².

Political, ideological or religious groups, which cannot sponsor programmes on public broadcasters, are also banned from sponsorship on private channels. The *Werberichtlinien* exclude from sponsorship any economic concern whose principal commercial activity is based on products banned from advertising either in the RfStV or by other legislative norms, mainly tobacco products and medicines on prescription⁵³. The *Werberichtlinien* refer to the

⁴⁹ *Gemeinsamen Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen, (Werberichtlinien)*, 8 November 1994.

⁵⁰ Rule 9(5), *ibid.*

⁵¹ Rule 9(1), (2), (4), (6) and (7), *ibid.*

⁵² Rule 9(3), *ibid.*

⁵³ Rule 9(7), *ibid.*

provisions laid down by the *Deutsche Werberat* only for the advertising of alcoholic drinks, but sponsorship of programmes by manufacturers of such beverages is allowed⁵⁴.

V. 4. 2. 4. Issues in the practice of sponsorship

Several problems have arisen from the different regulatory systems that apply to sponsorship in public and private broadcasters. For years, public broadcasters have been carrying out sponsorship practices that were audacious even for private broadcasters, under the eye of the media regulators. In January 1996, ZDF showed additional sponsorship bumper credits immediately before and after commercial breaks, just before the 20.00 h close down for television advertising on public television. The comment at ZDF was that “this practice drew swift and heavy criticism from private broadcasters”⁵⁵. The practice received official approval and the public broadcaster did not worry further⁵⁶.

Private television has been regularly using references to sponsors at centre breaks ever since ZDF started, however. Influenced by broadcasters’ behaviour, the *Landesmedienanstalten* will allow officially additional sponsor credits on commercial television in the new revision of the *Werberichtlinien*, Summer 1998, to legalise normative practice in the television sponsorship field. This was ratified by the ECJ in December 1996 in the *RTI* case⁵⁷. The ECJ judged that the sponsor’s identification requirements must be interpreted as permitting the insertion of the sponsor’s name or logo at times other than the beginning and /or the end of the programme⁵⁸.

⁵⁴ Rule 2(1), *ibid.*

⁵⁵ Letter from Heiko von Debschitz, ZDF International Affairs, 12 June 1997.

⁵⁶ “*Rechtsaufsicht: „Schattenmann“-Sponsoring „noch“ im Rahmen*”, *epd/Kirche und Rundfunk*, N°30, 20 April 1996, 22.

⁵⁷ Letter from Heiko von Debschitz, ZDF International Affairs, 12 June 1997.

Private broadcasters have been warned and fined several times for breaking the rules on sponsor identification. For example, SAT 1 was warned by the independent media regional regulator (URL) on 2 October 1996 for failing to identify a sponsor properly in a regional programme⁵⁹.

V. 4. 3. Italy

V. 4. 3. 1. The road to sponsorship regulation

The regulation of sponsorship is laid down in Article 8 paragraphs (12) to (15) of the Mammi Law⁶⁰. Sponsorship is defined in Article 8(12) as any contribution by a public or private business not involved in audio-visual work, to the finance of programmes, aiming at the promotion of its name, its image, its activities or products.

The contents or scheduling of a sponsored programme must not be influenced by the sponsor in any way that may damage the broadcaster's responsibility and editorial autonomy. The Italian legislator established a ban on programme sponsorship by those people or businesses whose main activity is the manufacture or commercialisation of cigarettes and other tobacco products, alcoholic spirits, and medicines or medical treatments available only on prescription⁶¹. Sponsored programmes must be clearly identifiable as such and must show the sponsor's name or logo in the beginning or end credits.

⁵⁸ ECJ, Judgement of 12 December 1996 in Joined Cases C-320/94, C-328/94, C-337/94, C-338/94 and C-339/94, *RTI v Ministero delle Poste e Telecomunicazioni*, 1996 ECR, I-6471.

⁵⁹ "URL: SAT 1 hat gegen Sponsoringbestimmungen verstoßen", *epd/Kirche und Rundfunk*, N° 78/79, 9 October 1996, 18.

⁶⁰ Law 223 of 6 August 1990 on the discipline of public and private radio and television, (Mammi Law), GU 185 of 9 August 1990; Ministerial Decree 581 of 9 December 1993 on the regulation of sponsorship and offers to the public, GU 8 of 12 January 1994.

⁶¹ Article 8(13) and (14), Law 223/1990.

In the Mammì Law, sponsored programmes were considered to be advertising messages for airtime limits at a minimum of two per cent of the programme duration. This provision was stricter than the rule in the TWF Directive, and was later eliminated⁶². The Mammì Law, however, failed to transpose both the ban on promotional reference to the sponsor's products, and the ban on the sponsorship of news and current affairs programmes.

Decree 439/1991, which was issued to regulate sponsorship for both public and private broadcasters, prohibited the sponsorship of newscasts and programmes with a political content but allowed the sponsorship of programmes with a specific content, such as culture, economics or sports, provided that there was no interpretation or comment⁶³. The Decree banned the sponsorship of children's animated cartoons (*cartoni animati*) and audio-visual works of high cultural, religious or educational content⁶⁴.

However, Ministerial Decree 439/1991 still did not transpose the ban for programmes to promote the sponsor's products and the European Commission formally warned the Italian government about failing to implement the TWF Directive correctly⁶⁵. The Ministerial Decree authorised references to the sponsor's trademarks, products or services within the sponsored programmes even by using superimposed texts or transparencies⁶⁶. The European Commission considered that the Decree did not comply with provisions in Article 17(1) of the TWF Directive, as well as to the ban on sponsored programmes to promote the sponsor's products.

⁶² Article 8(15), Law 223/1990.

⁶³ Article 5, Ministerial Decree 439 of 4 July 1991 on the sponsorship of broadcast programmes, GU 19 of 24 January 1992, 8.

⁶⁴ Article 4(2), Ministerial-Decree 439/1991.

⁶⁵ Commission of the European Communities, Letter to Emilio Colombo, Italian Minister of Foreign Affairs from Martin Bangemann, Commissioner, SG(92), Brussels 3 November 1992.

⁶⁶ Article 3(2a) to (2f), Ministerial Decree 439/1991 of 4 July 1991.

In particular the European Commission stated that:

“Article 17(1) of the Directive requires, on the one hand, sponsored programmes to be easily recognisable as such, and *exclusively* by using the sponsor’s name/logo, and on the other, the sponsor identification to be done *only* at the beginning and/or the end of sponsored programmes.”⁶⁷

As will be discussed later, the issue was finally settled by the ECJ also allowing sponsor identification within the sponsored programme.

The Government approved new guidelines on advertising and sponsorship Decree-Law 408/1992 which proposed that the Minister of Post and Telecommunications adopted the necessary modifications to Ministerial Decree 439/1991 in order to align it with European regulations. It also prohibited programmes which incited to the purchase or rental of products or services, whether provided by the sponsor or by a third party, not included in previous legal texts⁶⁸.

Finally, in December 1993, Ministerial Decree 581/1993 regulating the sponsorship of television and radio programmes and offers to the public, was approved after a controversial debate in the press between all the parties involved⁶⁹.

V. 4. 3. 2. The regulation of sponsorship

Article 3 of Ministerial Decree 581/1993 transposes the provisions in Article 17(1) of the TWF Directive. The content of a sponsored programme cannot be influenced by the sponsor so as to infringe the responsibility and autonomy of the broadcaster. The sponsor may be identified by name and/or logo in the beginning and/or end credits. Sponsored programmes

⁶⁷ Letter to Emilio Colombo, Italian Minister of Foreign Affairs from Martin Bangemann, Commissioner, Brussels, 3 November 1992, 3, italics mine.

⁶⁸ Article 3(1c), Decree-Law 408/1992 co-ordinated with Conversion Law 483 of 17 December 1992, GU 297 of 18 December 1992; the rule became effective on 1 July 1993.

may not encourage the purchase or rental of the sponsor's products or services, especially by using promotional references to them.

Article 4(1) of Decree 581/1993 states that the sponsorship of broadcast programmes can only be expressed in trailers and in credits immediately before and after the programme. These credits should mention the sponsor's name or/and logo but exclude any form of advertising slogan or the presentation of the sponsor's products or services. Article 4 also imposes an eight second airtime limit for trailers and invitations to watch, to a maximum of three. In a sponsored programme of more than forty minutes of scheduled duration, the sponsor's logo or name may be mentioned for a maximum of five seconds within the broadcast of the programme.

As explained earlier, Article 8(15) of the Mammi Law considered sponsored programmes as advertising messages and established that at least two per cent of the programme duration would count towards the daily airtime limitations. The first Ministerial Decree 439/1991 also established that in order to calculate the advertising airtime quotas, sponsored programmes would be considered advertising messages in the measure of specific percentages of their transmission time, according to their duration and number of sponsors⁷⁰. Article 4 of Ministerial Decree 581/1993 categorised the possible forms of sponsorship of programmes and formally declared any other promotional forms of communication to be considered advertising messages and therefore subject to airtime quotas. In this sense, sponsorship was finally freed from airtime limits, but telepromotions are still subject to them⁷¹.

Decree 581/1993 identifies certain types of sponsorship different to advertising: Co-productions between broadcasters and sponsors, when the sponsors provide the broadcaster

⁶⁹ Ministerial Decree 581 of 9 December 1993.

⁷⁰ Article 12 and Appendix 1, Ministerial Decree 439 of 11 July 1991.

with goods and services, or the broadcast of cultural or sport events. The simple mention in the beginning and/or end credits of the co-producer's name or logo is not considered advertising, provided that there is no promotional reference to the co-producer within the programme. Co-production is defined as the financial contribution to a programme in exchange for programme rights or participation in the programme revenues. The same applies to products provided by the sponsor as prizes for use in the production of the programme. When the broadcast of a sport, cultural or entertainment event is not a broadcaster's initiative, but is sponsored by a third party, any reference to the name, trademark, logo, activity or products of the sponsor, when the reference is repeated and technically not necessary, would be considered advertising⁷².

Newscasts and programmes with a political, economic or financial content must not be sponsored, nor must consumer advice programmes⁷³.

Finally, the Decree restated that programmes cannot be sponsored by firms whose main activity is the manufacture or sale of cigarettes and other tobacco products, of drinks of high alcohol content, of medicines or medical treatments available only on prescription. "Main activity" is understood as the prevailing activity measured by turnover⁷⁴.

⁷¹Article 4(5), Ministerial Decree 581 of 9 December 1993.

⁷²Article 6(1a) (b) and (c), *ibid.*

⁷³Article 7, *ibid.*

⁷⁴Article 8, *ibid.*

V. 4. 3. 3. Problems in the practice of sponsorship

These regulations had a real impact on the ways in which sponsorship was being used. For example, the number of trailers was reduced from thirty on average per sponsored programme, to three. Superimposed texts and slogans were eliminated from sponsor's credits, and a ban was introduced on promotional references to the sponsor's products. For commercial television, these restrictions meant that sponsorship had to change drastically both as a form of commercial communication and as an additional source of income for broadcasters. According to Publitalia'80, the sales house of the Mediaset television channels, the realignment of Italy to European regulation led to a strong decline in the total amount of advertising on air⁷⁵.

Decree 581/1993 was contested by private broadcasters before the *Tribunale Amministrativo Regionale del Lazio* (TAR), alleging that the Decree was invalid since it introduced stricter rules on sponsor credits than those required by Article 17(1b) of the TWF Directive. The Italian Law could have allowed further mentions of the sponsor during programmes and not only at the beginning and/or end of programmes⁷⁶. The question was submitted to the ECJ for a preliminary ruling. The ECJ judgement in December 1996 considered that the TWF Directive provided that the identification of the sponsor must appear at the beginning and/or the end of programmes, but did not prohibit reference to the sponsor appearing during programmes. Member States could therefore set "stricter or more detailed rules" and the Italian government was entitled, though not required, to prohibit references to sponsors during programmes⁷⁷.

⁷⁵ Publitalia'80, "*Le nuove forme di pubblicità alla luce della direttiva CEE 552/89*", promotional brochure, 1994, 20.

⁷⁶ "Reference for a preliminary ruling of Court of Justice of the European Communities", OJ C 74 of 25 March 1995, 2-3, reported in *IRIS*, May 1995, Vol. I, 9.

⁷⁷ ECJ, Judgement of 12 December 1996 in Joined Cases C-20/94, C-328/94, C-329/94, C-337/94 and C-339/94, *RTI and others v Ministero delle Poste e Telecomunicazioni*, 1996 ECR, I-6471.

V. 4. 4. Spain

V. 4. 4. 1. Sponsorship in the beginning

Until the transposition of the Directive by Law 25/1994, sponsorship followed only the internal self-regulation rules laid down by the public broadcaster RTVE. The RTVE circular, written on the occasion of special advertising within the popular programme *The Price is Right*, defined sponsorship as an advertising operation by which a company offered to the audience a given programme, or series of programmes, in order to create a favourable image of the company or its activities, at the same time as broadcasting its trademarks, logos or making known its activities⁷⁸. Television sponsorship, for public television, and after 1990 also for private television, was unofficially regulated under these rules until the transposition of the TWF Directive into the Spanish legal system in July 1994.

V. 4. 4. 2. The regulation of sponsorship

Sponsorship is defined in Article 3(e) of Law 25/1994 as the contract by which a sponsor, with no connections to the production, sale or broadcast of programmes, contributes to the finance of television programmes in order to promote the name, trademark, image, activities or achievements of the sponsor⁷⁹. The contribution to programme finance does not necessarily imply payment to the television broadcasting channel for the sponsored programme.

⁷⁸ RTVE circular, *Publicidad especial en programas*, 23 October 1989, Gerencia de Publicidad RTVE.

⁷⁹ Law 25/1994 of 12 July 1994 of transposition of Directive 89/552/EEC, BOE 166 of 13 July 1994, 22342.

Sponsorship regulations are laid down in Article 15 of Law 25/1994. Paragraph 1 transposes the provisions in Article 17 of the TWF Directive, on the safeguard of the broadcasters' independence, on the identification of the sponsor, and the ban on promotional references to the sponsor's products.

The contents of the sponsored programme must not be influenced by the sponsor so as to harm the broadcaster's responsibility or editorial independence.

Sponsored programmes must be clearly identified as such, by using the sponsor's name, logo, trademark other signs, at the beginning and/or at the end of the programme. The Spanish regulator opted to set a minimum requirement for the sponsor's identification, so that sponsorship does not become a form of surreptitious advertising, but in no way was this minimum a limitation. The sponsor's logo or name can also be used in trailers or in bumper credits in centre breaks. Superimposed texts can convey references to the sponsor throughout the broadcast of the programme⁸⁰.

The Law allows the sponsor's identification within the programme, provided that it does not disturb its normal progress and is occasional⁸¹. But sponsored programmes must not contain advertising messages with outspoken promotional references directly aimed at the purchase of the sponsor's products⁸².

Article 15(2) bans those companies, whose main activity is the manufacture or sale of products or services which are banned from television advertising, from sponsoring television programmes. These are tobacco products, medicines on prescription and political advertising, as well as illicit advertising. The latter includes, as mentioned in Chapter IV,

⁸⁰ Article 15(1), Law 25/1994.

⁸¹ Article 15(1b), *ibid.*

misleading and unfair advertising, subliminal techniques and alcoholic drinks of more than twenty degrees⁸³.

News and current political affairs programmes cannot be sponsored. Private channels use sponsorship within other informational programmes: Companies like Ford and Cepsa, the public oil company regularly sponsor sport reports⁸⁴.

Finally, the Spanish regulator explicitly excludes airtime dedicated to sponsorship credits from the daily and hourly advertising limits⁸⁵.

V. 4. 5. UK

V. 4. 5. 1. The first rules

Until the Broadcasting Act of 1990, strict rules of the Independent Broadcasting Authority (IBA) applied to ITV and Channel Four. Sponsorship had been less restricted on satellite and cable channels, which were regulated under a different set of rules by the Cable Authority⁸⁶.

IBA rules not only prohibited the direct sponsorship of programmes by advertisers, but also prevented methods of advertising which blurred the distinction between advertising and programme content. These regulations, instituted in January 1982, recognised sponsorship for the broadcast of events and prohibited dual sponsorship, that is sponsorship by outside

⁸² Article 15(1c), *ibid*.

⁸³ Articles 3 and 8(5), Law 34/1988 of 11 November 1988, General Law on Advertising, BOE 274 of 15 November 1988.

⁸⁴ *Asociación de Usuarios de la Comunicación* (1995) “*La publicidad en televisión*”, study funded by the EU on compliance with the TWF Directive by Spanish television channels.

⁸⁵ Article 15(4), Law 25/1994.

⁸⁶ ITC, Review of ITC Code of Programme Sponsorship, Explanatory Memorandum, September 1996, 1.

partners of the coverage of events that are themselves sponsored. The IBA rules excluded news and information programmes from sponsorship, as well as films about industry or business sponsored by companies for the purpose of promoting their activities, products or services, unless such films were considered by the IBA to be of intrinsic interest or educational value. Until the 1990 Broadcasting Act, sponsorship in the UK remained restricted to broadcasts of factual events, sports, art or entertainment.

In 1984, the Cable and Broadcasting Act authorised sponsorship as a source of finance for cable services. It specified that any mention of the name, trademark or firm had to be subject to IBA prior approval. Since this Act, sponsors have been allowed to include credits before, after and during the sponsored programme. The Cable Authority issued a Code of Practice in 1985. Sponsorship had to comply with the provisions of the IBA Code of Advertising Standards and Practice and was considered advertising time if included within the programme. The sponsor credits could mention brand names and advertising slogans when goods or services were provided by the sponsor except in game shows, where no slogans were allowed⁸⁷.

In February 1988, the Incorporated Society of British Advertisers (ISBA) issued certain guidelines on sponsorship⁸⁸. The ISBA favoured a self-regulatory system in the field and drew up these guidelines on behalf of the industry, subject to discussion each year and with the intention of making improvements in the practice of sponsorship. The ISBA guidelines acknowledged the need to identify the sponsor before and after the sponsored event, and during the event itself. Sponsors should not control the shape, content or style of a sponsored programme although they might reasonably influence it⁸⁹.

⁸⁷ CoE (1991) *Mass Media Files N°9*, Strasbourg, paragraphs 46, 72, 161, 177, 178.

⁸⁸ "Guidelines on sponsorship proposed by the Incorporated Society of British Advertisers", February 1988, in CoE (1991) *Mass Media Files N°9*, op.cit, Appendix VI, 97.

⁸⁹ Rules 3.2, 3.3, 3.5., *ibid.*

In 1990, the Broadcasting Act acknowledged sponsorship as an alternative source of revenue for broadcasters and required the Independent Television Commission (ITC) to draw up a Code “governing the standards and practice in advertising and in the sponsoring of programmes, and prescribing the advertisements and methods of advertising or sponsorship to be prohibited, or to be prohibited in particular circumstances”⁹⁰. The ITC Code of Programme Sponsorship (CPS) sets up the practice of sponsorship, includes a definition and identifies forms of sponsorship to be prohibited.

V. 4. 5. 2. The ITC Code of Programme Sponsorship

The first CPS of January 1991 was influenced by the Explanatory Report of the CoE Convention on Transfrontier Television, which was oriented more towards the protection of viewers and the integrity of audio-visual works than the TWF Directive. The main purposes of the CPS were to keep advertising and sponsorship distinct and separate, to safeguard viewers from advertisers’ misleading influences, and to prevent any influence by the sponsor on the content of the programme. The ITC, therefore, went much further in detail and in the protection of the viewer than Article 17 of the TWF Directive.

The initial CPS was first revised in January 1994, and again on 26 March 1997⁹¹. As in the case of spot advertising, the new CPS lays down a double set of rules, depending on whether the broadcast service is terrestrial or satellite/cable, and introduces modifications in some areas to widen the scope for sponsorship without the risk of sponsors excessively diverting the editorial agenda for commercial purposes.

⁹⁰ Section 9(1) of Broadcasting Act 1990; see discussion Chapter III of this thesis.

⁹¹ ITC circular, *ITC publishes revised Code of Programme Sponsorship*, 26 March 1997.

In the revision period before the 1997 CPS, several opinions were checked. Those seeking change argued that some restrictions of the CPS inhibited the development of sponsorship as a source of revenue and were not justified by the principle of consumer protection⁹². Among these, the ITC Licensees' Sponsorship Group believed that the ITC had interpreted the provisions in the TWF Directive in too narrow a way. The CPS is more protective of television content in two ways. First, it seeks to put severe limits on who and what is sponsored: That is, if the programme had interests very similar to those of the sponsor's interests, it would be likely to have some influence on the programme content. Second, the difference between advertising and sponsorship has to be clear⁹³. For both advertising and commercial broadcasting interests, transparency must ensure that the viewer knows what the relationship between the sponsor and a programme is. Then, they argue, viewers can make their own judgements about it. "Apart from overt sales messages in programmes, which are unacceptable, many of the other restrictions laid out in the CPS are seen as unnecessary"⁹⁴. Although the ITC did not fully agree with the argument, it accepted that the television context had changed sufficiently since 1991. There are now changes in the regulatory framework of the ITV companies and in the structure of television in the UK, e.g. Channel 4 sell now their own advertising airtime, or the appearance of a new terrestrial channel, Channel 5, or a significant expansion of satellite and cable channels⁹⁵. These changes justified the modification of the CPS.

⁹² ITC Review of ITC Code of Programme Sponsorship, Explanatory Memorandum, September 1996, 1.

⁹³ Eve Solomon, ITC, interview in London, October 1995.

⁹⁴ Geach, H. (1996) "Sponsorship on Commercial Television: A European Perspective", *Commercial Communications*, September 1996, Vol. 1, Issue 4, 4.

⁹⁵ ITC Explanatory Report, *ibid.*

V. 4. 5. 3. The rules on sponsorship

The CPS refers to “advertising supplied” programmes, barter and merchandising and licensing arrangements. The provision of a programme in exchange for advertising time or barter does not fall into the definition of sponsorship and is unacceptable therefore⁹⁶. Product placement, the coverage of events, game shows and viewers’ competitions will be analysed in Chapter VI, as examples of potential surreptitious sponsorship.

A programme is deemed to be sponsored if any part of its production or transmission cost is met by an advertiser with a view to the promotion of its own or another’s name, trademark, image, activities, products or other direct or indirect commercial interest, where “advertiser” means any other organisation or person than the producer or broadcaster. Advertiser-supplied programmes are considered to be sponsorship if the programme funders have a promotional purpose. Merchandising agreements do not constitute sponsorship, but if the programme or its transmission were to be funded in any way by the product manufacturer, the agreement could become surreptitious sponsorship⁹⁷.

No sponsored programme may be broadcast at a time or in circumstances where the sponsor would be restricted from advertising under the ITC Rules on Advertising Breaks⁹⁸. Subject to scheduling restrictions are, for example, alcoholic drinks, medicines targeted to children or matches⁹⁹.

Prohibited sponsors are those whose objects are mainly of a political nature, tobacco producers and any advertisers prohibited in the ITC Code of Advertising Standards and

⁹⁶ Rule 1.3, ITC Code of Programme Sponsorship, March 1997.

⁹⁷ Rule 1.4, *ibid.*

⁹⁸ Rule 3, *ibid.*

⁹⁹ Rule 4.2.1, 4.2.2, 4.2.3 and 4.2.5, ITC Rules on Advertising Breaks, January 1991.

Practice. Any person whose business consists wholly or mainly in the manufacture or supply of pharmaceutical products available only on prescription is also banned from sponsorship. This rule may change in the light of the 1997 TWF Directive revision¹⁰⁰. Other categories restricted from sponsorship are bookmarking, and betting and gaming services, which are specifically banned from sponsoring children's programmes¹⁰¹.

Rules 5, 6 and 7 establish the categories of sponsorable/non sponsorable programmes. All programmes may be sponsored except news and current affairs. The term "news" comprises programmes and news flashes, local, national or international. Cultural, sports, traffic, travel or weather reports, when clearly separated from general news, may be sponsored. Business and financial reports are sponsorable if they do not contain analysis or comment. Current affairs programmes or other programmes containing explanation or analysis of current events must not be sponsored. The term "current affairs" includes programmes dealing with matters of political or industrial controversy, or with current public policy. Finally, Rule 6.5 explicitly prohibits the use of news presenters in sponsored programmes¹⁰².

The previous versions of the CPS provided that programmes offering consumer advice on the purchase or use of products and services of the kind marketed by the sponsor may not be sponsored¹⁰³. There was potential opportunity for surreptitious sponsorship and loss of editorial freedom. The commercial arguments for a change in this rule emphasised that there were other measures to protect viewers from the sponsor's influence, especially rules on product placement and promotional references to the products and services of the sponsor which were not editorially justified¹⁰⁴.

¹⁰⁰ See Section V. 3. 3. of this Chapter.

¹⁰¹ Rule 4, ITC Code of Programme Sponsorship, March 1997.

¹⁰² Rules 6.1, 6.3 and 6.5, *ibid.*

¹⁰³ Rule 9, ITC Code of Programme Sponsorship, January 1994.

The concern at the ITC was that sponsors with an affinity to the programme content are likely to exert influence over the content to best serve their commercial interests. Consumer advice programmes offering reviews and advice on the purchase and rental of products or services, including where to go or what to see, may not be sponsored by advertisers with related business interest. However, the 1997 CPS is more relaxed about “how to do” (instructional) programmes (as opposed to “what to buy”). They may be sponsored by advertisers with an interest in the practical advice area. It eased controversies created by previous versions, for example, the case of food retailers, which could sponsor a cookery programme, while a brand of a cooking ingredient could not. The retailer did not own brands as such, therefore the logic was that, as a sponsor, the retailer was unlikely to have a direct interest in the content of the programme¹⁰⁵.

The main principle guiding the UK regulation of sponsorship is the clear separation from advertising, so that sponsorship does not become a way of circumventing advertising airtime limits. Any sponsorship must be clearly identified at the beginning and/or end of programme and there may be bumper credits at centre breaks, but no sponsor credits are allowed within the programmes¹⁰⁶. On the issue of promotional references to the sponsor in the case of sponsored programmes, it is unlikely that any reference to the sponsor will be editorially justified. Generic references to the sponsor’s (unbranded) product, service or business may amount to promotional references¹⁰⁷.

The CPS establishes stricter rules for the duration of credits for ITV, Channel Four and Channel Five. The sponsorship message must not suggest that the broadcaster has ceded its responsibilities to the sponsor, so messages like “brought to you by” are unacceptable.

¹⁰⁴ ITC Licensees’ sponsorship group presentation for the ITC, November 1995, 8.

¹⁰⁵ Rule 7.1, ITC Code of Programme Sponsorship, March 1997.

¹⁰⁶ Rule 8.1 and 8.2, *ibid.*

¹⁰⁷ Rule 10.2, *ibid.*

Credits may indicate the connection between the sponsor and a brand or the nature of the sponsor's business, i.e. "sponsored by x, makers of y"¹⁰⁸.

Strap lines are phrases or lines used to connect the content of the programme with a value statement about the sponsor. The distinction between an advertising slogan and a sponsorship strap line is very fine. The main criterion is whether the phrase has already been used in advertisements¹⁰⁹. Credits may include audio or visual strap lines which clearly refer to the programme or to the sponsor's relationship to the programme. Strap lines or slogans of a general nature may appear in static, visual display only, but in no circumstances may strap lines directly encourage the purchase of the sponsor's products, by making specific references to prices, characteristics or by the inclusion of injunctions to purchase¹¹⁰.

There must be no visual or aural extracts from the sponsor's television advertising slogan in credits, any trailer or sponsored programme¹¹¹.

Credits must not feature the sponsor's specific or branded product or any visual representation of them. In no circumstances may a specific product or service's benefits be shown or referred to¹¹². Credits may include the sponsor's name, trademark or logo without restriction on size subject to the conditions for straplines and the prohibition of product representation. Because of the new Trade Marks Act 1994 it became easier to register product representations and self referring value statements¹¹³. The 1997 CPS introduced consistency in the rules making no differences between those product representations that are

¹⁰⁸ Rules 8.3, 8.4 and 8.5, *ibid*.

¹⁰⁹ ITC Licensees' sponsorship group, *op. cit.*, 17.

¹¹⁰ Rule 8.6., ITC Code of Programme Sponsorship, March 1997.

¹¹¹ Rule 8.8, *ibid*.

¹¹² Rule 8.7, *ibid*.

¹¹³ Trade Marks Act 1994, Halsbury Statutes, 4th edition, 48. Trade Mark is defined as any sign capable of being represented graphically which is capable of distinguishing goods or services of one

registered and those that are not. Finally, no performers or characters who appear in a sponsored programme may be used in the sponsor credits¹¹⁴.

For ITV, Channel Four and Channel Five, the sponsor's name must not be used in a programme title except when the title is that of a sponsored event covered by the programme.

For other channels, the mention of the sponsor's name must not imply that the programme sponsor is the event sponsor if this is not the case¹¹⁵.

The TWF Directive provision for programme independence is stated in Rule 9.1 of the CPS:

“A core principle of this Code is the preservation of programme integrity by not allowing programme agendas to be distorted for commercial purposes. No sponsor is permitted any influence on either the content or the scheduling of a programme in such a way as to affect the editorial independence and responsibility of the broadcaster”.

The question of when a schedule is being influenced by the sponsor is a grey area. Channel Four, for example, planned in November 1995 a week-end of programming around the theme of Virgin Vodka. The question is to determine to what extent a broadcaster could accommodate its schedule to the advertiser's needs¹¹⁶.

Masthead programming, that is programming funded by a periodical, newspaper, book or informational software publishers, which incorporates the product's name and which has editorial content similar to the product, is banned on terrestrial television and is subject to stringent rules on other services¹¹⁷. There must be no in-programme cross-promotion with the publication.

undertaking from those of other undertakings. A Trade Mark may, in particular consist of words (including personal names) designs, letters, numerals or the shape of goods or their packaging.

¹¹⁴ Rules 8.9 and 8.10, *ibid*.

¹¹⁵ Rule 8.11, *ibid*.

¹¹⁶ “Scheduling for Sponsors”, *Media Week*, 3 November 1995, 12.

Sponsored support material is classified as off-air material made available to viewers as back up to a programme. It may be trailed after the programme and may be sponsored. Any such sponsorship must be credited. It could include books, videos, tapes, information packs and other publications as well as off-air activities such as helpline¹¹⁸.

The CPS also applies to acquired programmes, including those acquired outside the UK, but Rule 16 specifically states that “films made for the cinema and coverage of sporting and other events taking place outside the UK, however, may deviate from the Code where this is unavoidable”.

The BBC is not immune from commercial pressures and has produced a list of guidelines for producers in which very clear ground rules must not be contravened¹¹⁹. The BBC does not publish a regular report of infringements and complaints, so it is difficult to say how widespread the practice is in BBC programmes, or if it exists at all as an issue¹²⁰. According to the 1996 Producers’ Guidelines, programmes must never give the impression that they are promoting any product, service or company. Television should not linger on a brand name or logo during a factual report unless justified for strong editorial reasons¹²¹.

The ITC provisions on sponsorship must be observed by BBC World-Wide Television services uplinked from the United Kingdom¹²². The BBC has also approved a set of guidelines for sponsorship on these international channels. The guidelines specifically ban from sponsorship manufacturers or suppliers of alcoholic beverages¹²³.

¹¹⁷ Rule 10.6, *ibid.*

¹¹⁸ Rule 15, *ibid.*

¹¹⁹ BBC Producers’ Guidelines, Chapters 30 and 31, London, November 1996.

¹²⁰ Pamela Simpson, “Oops, sorry about that”, *Media Awareness Project*, March 1994, 7.

¹²¹ BBC Producers’ Guidelines, Chapter 31, 3.

¹²² *ibid.*, Chapter 33, 9.

¹²³ BBC, “Guidelines for sponsorship on the BBC’s international television channels”, Editorial Policy, London, 26th January 1996.

V. 5. Conclusions

The national interpretation of the principles underlying sponsorship regulation within the European framework has resulted in different regulatory environments for television sponsors. The basic principles are to separate sponsorship from advertising and programme content; to safeguard the broadcaster's independence and to prevent sectors banned from advertising on television from circumventing the prohibition by using sponsorship. On the advertising side, sponsorship is a direct contribution to the programme cost in exchange for the promotion of the sponsor's image. Sponsorship may be used to circumvent increased advertising clutter in commercial breaks, by promoting a relationship in the viewer's mind between the sponsored programme and the sponsor. The more similar programme content is to the sponsor's commercial activities, the more interest the sponsor has in being associated with it. On the regulatory side, this connection between programme content and economic activity is a potential threat to the broadcaster's editorial independence.

The need to separate sponsorship from programme content and to differentiate it from advertising is translated in certain provisions for sponsor identification. Sponsorship is not subject to advertising airtime quotas. The TWF Directive mentions the sponsor's name and logo as means of identification but the use of other signs are nationally based decisions. The TWF Directive mentions the beginning and end credits as the minimum requirements for sponsor identification, but nothing is said about further references to the sponsor, for example, at bumper credits, in advertising centre breaks, in trailers and invitations to watch, or even during the sponsored programme. The need for regulators to quantify sponsor's references and to set the criteria for these mentions arises from the second basic principle, the protection of the broadcaster's independence. Non-credited sponsorship is usually considered as surreptitious advertising or surreptitious sponsorship, the subject of the next chapter.

The TWF Directive left the concept of editorial independence to interpretation by individual Member States. The only requirement specified at the European level is that sponsored programmes must not encourage the sale or purchase of the sponsor's, or a third party's, products. How editorial independence is understood in each of the five Member States studied in this thesis is reflected in the different sets of rules governing sponsorship. The five Member States studied prohibit the sponsor from influencing the scheduling of a sponsored programme, but do not provide for measurement criteria.

Only Germany requires the sponsor to be identified at both the beginning and end of a sponsored programme, whereas the TWF Directive leaves the possibility of identification at one moment or the other. The ECJ judgement in *RTI v Ministero delle Poste e Telecomunicazioni* allows Member States to have more references to the sponsor during the programme. In Germany the rules for private broadcasters, the *Werberichtlinien*, will allow sponsor credits in commercial breaks in Summer 1998, a practice that public broadcasters had already been using for some time. France allows sponsor credits to appear only at the programme beginning or end. Italy, Spain and the UK allow sponsor credits at the beginning and/or end of the programme. Member States can introduce stricter rules, but the TWF Directive's requirement is a minimum one. More sponsor credits can mean that regulations are less strict, because the sponsor gets more presence, which is considered a threat to the broadcaster's editorial independence. More sponsor credits can also mean a "stricter" view, because the public is more informed about the relationship between the sponsor and the programme content.

The identification may be by means of the sponsor's name and/or logo, according to the European text. France excludes advertising slogans and/or products in sponsor credits. Germany bans slogans but nothing is said about products. Credits usually last between five and seven seconds. Italy allows the sponsorship of trailers with credits of eight seconds long and excludes any slogan or product presentation within these trailers. In programmes that last more than forty minutes, Italy allows the mention of the sponsor for up to five seconds. In Spain, slogans or products could eventually be shown as references during the programme, provided they do not disturb the normal process of the programme. But Spanish regulators have not set a proper definition of the type of sponsor mention which would not disturb programmes. France has limited the duration of credits to five seconds, as does the UK. In the UK, sponsor credits are permitted in commercial breaks but promotional references of the sponsor are banned within the programme. Credits are quantified and qualified in their form and content.

Certain category of programmes are also banned from being sponsored. In Italy, consumer advice programmes and children's animated cartoons cannot be sponsored. In the UK, for example, advertisers are not allowed to sponsor those programmes related to their economic activities.

The ban on the sponsorship of news programmes stated in Article 17(3) of the TWF Directive has been understood in all five Member States as a ban on "hard" news. Current affairs have been interpreted as "political information". This means that only those current affairs with a pure news content cannot be sponsored. It is not clear, however, that all countries would interpret "news and current affairs" in the same way. The latter travel well across countries, so they are prone to be subject to lenient treatment by regulators and broadcasters. In France, there is a difference with television advertising, which was banned

from “*magazines d’actualité*” of less than thirty minutes. In that case, the adjective “political” has been dropped, whereas it is present in the sponsorship ban, making the rule less restrictive. In the national texts, “current affairs” is generally understood as those magazines devoted to current affairs, which include political analysis, therefore allowing weather forecasts and financial programmes, for example, to be sponsored.

Categories of sponsors also vary across Member States. In France, certain economic sectors banned from advertising on television, in particular the press and distribution sectors, are allowed to sponsor programmes. Tobacco products are banned from sponsorship across the five Member States studied, as are advertisers whose principal activity is the manufacture or sale of medicines on prescription. France bans alcoholic drinks from sponsoring programmes, but Italy and Spain only ban alcoholic drinks of high alcohol content from becoming sponsors. The latter qualifies “high content” as more than twenty degrees of alcohol. Germany allows manufacturers of alcoholic drinks of any alcohol degree to sponsor programmes, subject to certain content guidelines. In the UK, the ITC restricts scheduling times of programmes sponsored by manufacturers of alcoholic drinks. However, the BBC bans manufacturers or suppliers of alcoholic beverages from sponsoring programmes on BBC’s international television channels. Spain also bans from sponsorship companies whose main activity is the manufacture or sale of what constitutes illicit advertising.

The requirement for the avoidance of direct and express invitations to buy the sponsor’s products in a promotional way is ruled by the principle of independence and editorial freedom. The regulation of sponsorship has not covered all areas of the development of this commercial practice. It appears from this research that all unidentified advertising, or sponsor’s mentions or credits not properly acknowledged are treated by some regulators as surreptitious advertising. In the same way, all excess of sponsor presence or credited

mentions can become surreptitious advertising, surreptitious promotion or sale. The issue is either that there is no transparency in the relationship between the broadcaster and the advertiser, or that the nature of that relationship is misleading to the viewer, i.e., not a sponsorship transaction but a sale or product promotion. This constitutes the subject of the next chapters.

CHAPTER VI

SURREPTITIOUS ADVERTISING

VI. 1. Introduction

The practice of sponsorship has developed grey areas which are sometimes assimilated to surreptitious advertising. Examples include product placement, game shows and viewers' competitions. When the advertiser is a funder of broadcast programmes, the relationship may take the form of a product being present in a programme, of more sponsor credits than are necessary for the sponsor to be identified as such, or of an express invitation to purchase or rent the sponsor's products or services. Sponsorship becomes surreptitious either if the sponsor is not properly identified or if they are over identified; if products are used, that are not editorially justified, or when sponsor references occur in such an obvious way that it presupposes intentionality, in exchange for remuneration. In these cases, the sponsor can influence programme content. Surreptitious advertising is prohibited in the TWF Directive because the viewer should be clear about the relationship between the advertiser and the broadcaster.

The legal status of surreptitious advertising or surreptitious sponsorship, at both the European and the national level, has been developed within the framework of sponsorship regulation. The borderline between advertising and surreptitious advertising or surreptitious sponsorship is a fine one. As explained in the previous chapter, it is difficult to include in the definition of sponsorship all the relationships between advertisers and broadcasters other than traditional advertising. Legal texts at the European level refer to these new commercial practices in connection with sponsorship. Both the CoE Convention on Transfrontier Television and the

1989 TWF Directive have extended a ban on surreptitious advertising, and have established guidelines to protect both the broadcaster's editorial independence and viewers from undue influence by advertisers, while recognising their role in the funding of European television.

As a concept, surreptitious advertising or sponsorship is generally banned throughout the European Union, but its definition is left to Member States. Problems arise when the prohibition is confronted by the numerous practices of a surreptitious nature similar to sponsorship. The different ways in which the five Member States studied understand the principles behind sponsorship regulation have led to divergent concepts of surreptitious advertising. In some cases, such as the broadcast of sportive events, these differences raise pan-European issues. Different regulations apply whether Member States want to promote transparency for the information of viewers by allowing more advertising presence, or transparency of programme content by restricting advertising presence. The balance between those principles shapes the concept of the regulation of surreptitious advertising.

VI. 2. Areas of discussion

VI. 2. 1. Prohibitions of surreptitious advertising and of subliminal techniques

In 1989, the CoE Convention on Transfrontier Television banned the practice of surreptitious advertising.

“Surreptitious advertisements shall not be allowed, in particular the presentation of products or services in programmes when it serves advertising purposes”.¹

The Explanatory Report of the Convention justified this ban on the basis of the need for a clear separation of advertising from other programme items.

¹ Article 13(3), CoE Convention on Transfrontier Television, Strasbourg, 5 May 1989.

Surreptitious advertising is defined in the TWF Directive as:

“the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration.”²

This definition follows the one used in the 1984 Directive on misleading advertising which refers to hidden advertising within a programme³. The TWF Directive presumes intentionality in particular where a product is shown in return for remuneration and thus delimits the definition in the Directive misleading advertising. It is only the intentional representation of goods or services in programmes that is banned⁴. In practice, the existence of payment or remuneration is difficult to assess.

The CoE definition of surreptitious advertising has wider scope than that of the TWF Directive, because it bans presentations which serve all advertising purposes, not only those that are intentional. The difference between the two reflects Member States' interpretations, which by adopting one or the other, make their definitions of surreptitious advertising more or less restrictive.

Surreptitious advertising must not be confused with subliminal techniques which are not defined in the TWF Directive, but are also subject to a prohibition⁵. These are advertising techniques which the human eye cannot perceive. The prohibition of such techniques seeks to protect the viewer from unwanted and unidentifiable advertising.

² Article 1(c), Council Directive 89/552/EEC of 3 October 1989, OJ L 298 of 17 October 1989.

³ Council Directive 84/450/CEE 10 September 1984, OJ L 250 19 September 1984.

⁴ Article 10(4), Council Directive 89/552/EEC of 3 October 1989.

⁵ Article 10(3), *ibid.*

VI. 2 . 2. Product placement as surreptitious advertising product presentations in viewers' competitions and games shows

Product placement designates the intentional presence of a product, a brand, a trademark or a logo in a feature film or a television programme. More or less unobtrusive, the presence is obvious enough for a producer to obtain payment from an advertiser in exchange for advertising impact for the product. This is a normal practice in feature films. One argument in favour of product placement is that it is common in cinema films, and films constitute a good part of scheduling especially in satellite and cable channels. Foreign productions and advertiser supplied programmes may include product placement or unidentified advertiser promotion. In-house production, where broadcasters are fully responsible and in control, is easier to control. Product placement in television programmes is a valuable way for advertisers to obtain more brand presence on screen. It is less intrusive than traditional spot advertising but viewers are often unaware of the transaction. Product placement is often considered as surreptitious sponsorship when not editorially justified. National regulators must provide forms of control over these promotional activities and ensure that they are “editorially justifiable”⁶.

In its 1991 report on sponsorship, the Council of Europe (CoE) defined product placement as the presence within programmes of commercial products by the requirements of a realistic scenario. Product placement would only seem to be prohibited if it constitutes surreptitious advertising, but then, when is product placement considered surreptitious?⁷.

In the 1989 CoE Convention, product placement was considered surreptitious advertising if it contravened directions for the separation of advertising from the rest of the programme,

⁶ Nick Bryant, *Media Dimensions*, interview in London, January 1996.

⁷ CoE (1991) *Mass Media Files N°9*, paragraphs 323, 324.

especially when its advertising nature was not identified. The CoE Convention required that the advertiser did not exercise any editorial influence over the content of the programme and banned the presentation of products or services for advertising purposes⁸. Prohibited product presentations were those praising the products or attaching a value judgement, or those using the same terms or visual elements as spot advertisements. On the other hand, the presentation of a product or service was justifiable only when it served informational purposes, or when such representation was necessary for the conduct of the programme, for example, as prizes in games shows, announcements for films in a film programme, or for literary works in a literary programme⁹.

The definition of sponsorship in the 1989 TWF Directive does not provide for product placement, but tries to prevent sponsorship from becoming an invitation to sell or buy goods or services. In particular, Article 17(1c) states that:

“Sponsored television programmes (...) must not encourage the purchase or rental of the products or services of the sponsor or a third party, in particular by making special promotional references to those products or services.”¹⁰

The aim of this article is to avoid the promotion of products or services within the programme. Sponsored programmes become prohibited sponsorship when they incite to the purchasing of the sponsor's, or a third party's, goods or services. This seems to imply that it is how the advertiser's name is mentioned or cited which can be considered as an encouragement to buy its products, not the mere mention of the name itself, and in this case, sponsorship becomes surreptitious even without the presence of products.

Product placement is usually accepted when it is necessary for the editorial content of the programme. It becomes difficult to assess when the “prominence” given to the product on the

⁸ Articles 11(4) and 13(3), CoE (1989) Convention on Transfrontier Television, op. cit.

⁹ CoE (1989) Explanatory Report to the Convention on Transfrontier Television, op. cit., paragraphs 180, 181, 182.

screen is needed, and the matter remains subject to interpretation both by broadcasters and regulators.

The regulatory concern is the influence that advertisers may exert on programme content. As in the case of sponsorship, the main issue for regulators is the safeguarding of the broadcasters' editorial independence. Advertisers argue that this objective may clash with consumer's right to be informed. Broadcasters and producers argue that programmes set in a real scenario have to portray a world full of trademarks and brands. For regulators it is a matter of trust in broadcasters and producers whether the presence of a product and the prominent image of its trademark is editorially justified.

Product placement is common in game shows and viewers' competitions. Game shows with a studio audience show products and services given by sponsors or other advertisers as prizes. Viewers' competitions are those which involve viewers answering a question and then telephoning or writing in with the reply. Viewers' competitions are a valuable tool for viewer loyalty and interactivity with the broadcaster. The advertising industry argues that prizes could briefly be mentioned by using a visual or aural reference without it becoming suspect of surreptitious advertising¹¹. The argument seems to imply that it is the manner in which the presentation is done, and not the presence of the product itself, or whether it is in return for payment or not, which makes the product presence intentional.

¹⁰ Article 17(c), Council Directive 89/552/EEC of 3 October 1989.

¹¹ The ITC Licensees' Sponsorship Group, presentation to the ITC, November 1995, 18.

VI. 2. 3. Surreptitious advertising/sponsorship in the coverage of events

It is increasingly difficult to separate the sponsorship of an event from television sponsorship. The financing of big events through sponsorship presupposes a balance of power between the advertiser, the broadcaster and the organiser of the event.

Organisers of events offer advertising opportunities linked to the event itself, whereas broadcasters offer their potential audiences. Event sponsors can try to require broadcasters to show their posters or brands by negotiating special agreements with them. Broadcasters can sell the sponsorship of the broadcast event in the form of credits, trailers and mentions of the sponsor, and this form of sponsorship is covered by the definition of the 1989 TWF Directive.

A distinction should be made between situations in which advertising is displayed in the background, and cannot be avoided by the broadcaster of the sponsored event, and those in which the broadcaster, intentionally and repeatedly, shows one or more particular advertisements on television. Problems can arise in events organised and broadcast from one Member State, with certain advertising and media regulation, and received in another, with different regulations.

There is a possibility for billboard advertising of banned-from-television products to appear on screen. Because the regulations for billboard advertising are usually less restrictive than broadcasting regulations, a potential case of surreptitious advertising may arise. At the time of writing, sponsorship on television is under pressure at the European level in areas which are deemed to be domains for consumer or public health protection, especially tobacco products and alcoholic drinks.

The European Union faced a complaint about Budweiser's sponsorship of the 1998 Football World Cup in France. It reflected the pressure that Member States are putting on European legislators to solve difficult and opposing policy aims. A key issue is to find the right balance of policy objectives, and to what extent the practice is a backdoor entry for advertisers banned from advertising on television. In other words, whether this type of sponsorship constitutes in fact a case of surreptitious advertising, or whether a ban, or stricter regulation, would imply a barrier hindering European trade.

The CoE Explanatory Report to the Convention stated that advertising at sport and similar events transmitted by a television channel remained a matter governed by domestic rules and practices. The Convention rules apply in situations in which the sponsor of both the event and the broadcast are the same, and where the broadcaster presented permanently, repeatedly or prominently, one or more specific billboards or posters on the television screen¹².

In 1986 the EBU established some principles on advertising for internationally televised sports¹³. Advertising should not affect the quality of the coverage or interfere with the view of the event for the television audience and should comply with the laws and rules of the country where the event was staged. Political and religious advertising was not permitted. The presence of advertising was subject to agreement between the organiser and the EBU broadcaster, and the agreements would not set precedents for advertising in other cases. Advertising should not be positioned between the camera and the action on screen, and it could not move in any way. Advertisement panels should remain of a compatible size with

¹² CoE (1989) Explanatory Report to the Convention on Transfrontier Television, op.cit, paragraphs 72 and 63.

¹³ EBU, "Principles on advertising for internationally televised sports events", May 1986, in CoE (1991) *Mass Media Files N° 9*, op. cit., Appendix IV.

the picture on screen with a maximum of three appearances. Slogans were not allowed and no advertising could be made in sound.

Technological advances have overcome the issue of static advertising in broadcast events. Broadcasters and advertisers can now use virtual publicity, to cater for individual audiences, specific Member States, or even regions within Member States. Virtual publicity systems, such as EPSIS in France, enable a television studio to insert a virtual advertising poster electronically into a television picture of a site in a sports stadium or a venue for an event instead of the real one, without any alteration at the venue or of the viewer being aware of any change. It is possible to include advertising where there is none in real life, or substitute on-site posters with others. Virtual images are inserted enabling different brands or advertisers to be seen in different countries or regions with the same feed or broadcast image. The technology can be applied to the footage of an event at that event, or to footage sent via satellite to the virtual advertising company where it is manipulated before being transmitted via satellite to other countries, or at the broadcaster's headquarters relaying coverage to viewers in a particular country¹⁴.

The EBU and the Association of Commercial Television have drawn up a Code of Conduct for Virtual Advertising, with the support of the advertisers' associations in Europe, EGTA, EAAA and EASA, and the World Federation of Advertisers¹⁵. It lays down some guidelines, intended as temporary rules, while the technique is being tested.

¹⁴ Grégoire, M. (1996) "Sports events: Sponsorship, transmission rights and television broadcast sponsorship", *Commercial Communications*, September, Vol. 1, Issue 4, 8.

¹⁵ EBU-ACT Code of Conduct, Virtual Advertising, December 1997, mimeo.

Virtual advertising is a double-edged problem for regulating “sensitive” products such as tobacco and alcoholic drinks, the main sponsors of sport events. For the advertiser, virtual technologies have the potential to affect outdoor advertising and to conflict with the interests of the sponsors of the event¹⁶. Virtual technology implies that sponsors and broadcasters may lose control over the coverage of the event. It makes it possible to circumvent national regulations. The advertising impact will depend on who sells the space for virtual advertising, whether the event organisers or the broadcasters, and on the size of the potential television audience for the event. The current massive rise in the cost of rights for the coverage of some sport events has probably had a certain input, but the question is outside the scope of this work.

¹⁶ “How virtual advertising works”, *Campaign*, 5 September 1997, 43.

VI. 3. National interpretations

VI. 3. 1. France

VI. 3. 1. 1. The regulation of surreptitious advertising

Until 1992, sponsorship was regulated by various recommendations and decisions from the CNCL and later the CSA. These texts set the boundaries for surreptitious advertising. Most of the problematic areas for the regulatory authority in the early 1990's were about product representation and the undue presence of the sponsor or its products within sponsored programmes. In 1987, a CNCL decision interpreting Decree 87-37 had allowed products on screen if they were given away as prizes in game show programmes or viewers' competition programmes:

“When the sponsor helps to finance a game show or viewers' competition programme, its products or services may be given as prizes to participants. These products may appear in the sponsored game show or competition programme at the moment of offering the prizes, provided that their presence is strictly neutral.”¹⁷

But under no other circumstances could the sponsor's products be shown, even in stylised form. A CNCL recommendation laid down the same rules for private broadcasters¹⁸. Based on these provisions, and on its own interpretations, the CSA later imposed monetary sanctions on infringing broadcasters.

Throughout 1990 the CSA found that in several cases broadcasters had been circumventing sponsorship rules, including product placement, references to advertising material in credits, references to the sponsor by programme presenters, and references which were longer than

¹⁷ Article 6, CNCL, Decision 87-327 of 7 December 1987, JO of 9 December 1987, 14330; CNCL *Recommendation relative au parrainage applicable aux sociétés de télévision privées*, JO of 9 December 1987.

¹⁸ Article 48, Law 86-1067 of 30 September gave the CNCL the power to regulate sponsorship also on

five seconds¹⁹. These practices illustrate how breaches of sponsorship rules are cases of surreptitious advertising. The CSA finally warned all broadcasters and issued precise guidelines on how to interpret Decree 87-37²⁰.

In 1991, the CSA started another sanction procedure against TF1 for the broadcast of a long promotional sequence within a programme sponsored by Peugeot. The programme included a seven minutes long staged promotion of the new model 106 Peugeot car during which the presenter cited the sponsor's advertising slogan several times²¹. The broadcast not only infringed the ban on the presentation of a sponsor's products during sponsored programmes, but also the CSA's criterion of a "punctual" mention of the sponsor²². As a result the private broadcaster was fined FF. 1,500,000 (£ 176,778)²³. TF1 contested the validity of the CSA's circular letter of 23 July 1990 before the *Conséil d'Etat*, arguing that the CSA had exceeded its regulatory powers²⁴. The *Conséil d'Etat*, however, ruled that in its letter, the CSA was merely interpreting the rules in Decree 87-37 of 26 January 1987.

public channels.

¹⁹ CSA, *Mise en demeure* to TF 1 and La Cinq, 13 April 1990, in *Lettre du CSA*, N°26, November 1991.

²⁰ CSA, Circular letter of 23 July 1990, quoted in *Droit de l'Audiovisuel*, Gavalda and Piaskowski (eds.), Paris:LAMY, 741.

²¹ CSA, *Procédure de sanction* against TF 1 of 22 October 1991, quoted in *Lettre du CSA*, "La publicité audiovisuelle", N°26, November 1991, 6.

²² CSA, Circular letter of 23 July 1990; a "punctual and unobtrusive" mention of the sponsor would not last more than five seconds and references would be separated by ten minute intervals. See Chapter V.

²³ CSA, Decision 94-399 of 7 July 1994, JO of 23 July 1994, 10636.

²⁴ "TF 1 fined for failing to keep to standards laid down for sponsoring", *IRIS*, 1995, Vol. I, N°3, 9.

VI. 3. 1. 2. Prohibitions of subliminal techniques and surreptitious advertising

The use of subliminal images is prohibited by Article 10 of Decree 92-280 of 27 March 1992.

The ban on surreptitious advertising laid down in the 1989 TWF Directive was finally enacted in Decree 92-280 of 27 March 1992²⁵. Article 9 prohibits surreptitious advertising and defines it as the aural or visual presentation within programmes, of goods, services, name, trademark or activities of a manufacturer or provider of services, when this presentation is for an advertising purpose. This definition is based on the 1989 CoE Convention definition, which does not insist on the notion of intentionality on the advertiser's part, as does the definition in the TWF Directive²⁶. Prior to the adoption of the Decree, the CSA had expressed its concern over the difficulty in proving the existence of payment²⁷, the wording of the Decree allowed the CSA to undertake sanction procedures against broadcasters.

The private broadcaster M6 was fined FF. 780,000 (£ 99,073) by the CSA in December 1995 for surreptitious advertising in showing the cover of a magazine publication eight times within a programme²⁸. The broadcast not only infringed the ban on advertising press products, but it clearly exceeded the CSA's limits for sponsor references. Other breaches had been about a Renault car being presented in a promotional manner in a series of programmes²⁹. Other warnings TF1 had received were for the promotion of books and

²⁵ Decree 92-280 of 27 March 1992 establishing the general principles of advertising and sponsorship, JO 28 March 1992, 4313.

²⁶ Article 13(3), CoE Convention on Transfrontier Television, *op.cit.*; Article 1(c), Council Directive 89/552/EEC of 3 October 1989.

²⁷ CSA, *Avis* 91-4 of 25 July 1991, JO of 20 August 1991, 10973.

²⁸ See also Chapter V.

²⁹ CSA, Decision 95-919 of 21 December 1995 inflicting a sanction on the company Métropole Télévision (M6), JO of 19 January 1996, 918.

cassettes. In November 1996, public broadcaster France 2 was also fined FF. 802,000 (£100,388) for promoting commercial products and service providers³⁰.

VI. 3. 1. 3. Product placement: game shows and viewers' competitions

Article 18(III) of Decree 92-280 allows the sponsor's products or services to be given away as prizes, provided that there are no promotional advertising messages. In game shows and viewers' competitions, prizes may be offered by the sponsor, without any advertising message.

In August 1995, a CSA circular stated its position on the legal status of game shows, interactive game shows, and viewers' competitions, i.e. competitions in which only viewers take part but with no possibility to interactively influence the course or content of the programme³¹. The CSA identified four types of programme being used by French television channels: first, competitions and game shows which are programmes in their own right, second, the inclusion of a competition within another programme by reason of its content and timing, third, the insertion of a competition included in another programme, but directly connected with a different one by reason of its content and timing, and finally, a competition which has no relevance to any kind of programme.

Only the first category, that is programmes in their own right, meets the conditions for sponsorship laid down in Decree 92-280 of 27 March 1992. This class of game show and competition must be identified as such, using credits at the beginning and end of the broadcast. Prizes consisting of products or services may only be offered by the sponsor, and if they are, their brand may be shown. Other advertisers' products may also be offered,

³⁰ CSA Decision 96-743 of 6 November 1996 imposing a sanction on the company France 2, JO of 26 November 1996, 17220.

provided that their brands are neither shown nor cited. The distinction applies to products offered, but not necessarily to those that are won³². At the moment when the prizes are given, neither advertising messages nor product promotion are allowed.

Prizes in game shows and competitions included in other entertainment programmes, may be provided by the programme sponsor, but not by the competition sponsor.

Game shows and competitions not related to a programme are unacceptable, because they constitute broadcasts whose only purpose is to advertise goods and services, and these therefore qualify as surreptitious advertising. However, the CSA would consider those “modules” attached to a programme to be a game show or a competition programme, provided that the module is clearly identified as such in the beginning and end credits, that the questions are not related to the programme to which the module is attached, and, that programme and module have different sponsors³³.

VI. 3. 1. 4. Broadcast of events: surreptitious advertising of certain products

The Evin Law bans alcohol and tobacco advertising on television and other media. The ban affects advertising and sponsorship at sport events, and their retransmission on television. The Law was examined by the Commission of the European Communities following pressures by alcoholic drinks producers and distributors in preparations for the 1998 Football World Cup, which is due to take place in France. American brewer Anheuser-Busch, for example, has signed a contract with FIFA, the world football federation, to sponsor the 1998 World Cup, and this presents a problem under the provisions of the Evin Law.

³¹ CSA, Circular to all television channels on game shows and viewers' competitions, August 1995.

³² Serge Ladhuie, CSA, interview in Paris, June 1996.

³³ “The *Conséil Supérieur de l'Audiovisuel* circularises programme producers on illegal indirect advertising”, *IRIS*, October 1995, Vol. I, 11.

The European Commission formally warned the French government that the Law infringed internal market rules, because it could prevent alcohol advertisers from being broadcast by foreign channels and could hinder both the freedom of expression and the free circulation of goods and services³⁴. The alcohol lobbying group *Enterprise and Prevention* was pressing in September 1996 to reform the Law, on the grounds that it had no impact on public health since it did not curb alcohol abuse. The enforcement of the Evin Law has mainly affected the retransmission of international sport events, such as Formula 1 motor racing or rugby matches, broadcast from countries with less strict rules in these sectors³⁵. French authorities prohibited the television broadcasts of rugby and football matches taking place in England and featuring prominent alcohol advertisements alongside the pitch. The move angered sponsors who complained that they had been denied exposure of their products on television channels outside France which would have broadcast the events. However, after the 1994 amendment of the Evin Law authorising billboards of alcoholic drinks in France, advertising of such products was effectively allowed in French stadia. Nevertheless, manufacturers have chosen not to make use of such an allowance.

Advertisers and event organisers argue that the Evin Law restricts sports organisers from selling television rights to French television stations; that advertising agencies are restricted in the selling of advertising space, and that manufacturers cannot advertise their drinks even if the match is played outside France, where there is a deal with French television³⁶.

³⁴ Advertising Information Group (AIG), "Alcohol Advertising", *AIG notices*, April 1997.

³⁵ "Ad bans under attack from Brussels", *Media International*, September 1996, 8.

³⁶ "French legal threat as drinks bodies fight *Loi Evin* sports ruling", *Marketing Week*, 12 June 1997, 8.

The provisional order of the regional court of Bordeaux of 11 March 1995 laid down that French television companies would no longer come within the scope of the Evin Law when broadcasting sports events taking place out of France, even if they showed advertising billboards for alcoholic drinks. Television companies could exert no control over the content of these events or of the pictures shown, or of the camera angles. They had nothing to do with placing the advertising billboards in the stadia³⁷. On the other hand, in April 1995, a Code of Good Conduct (*Code de bonne conduite*) was agreed between the CSA and broadcasters, but without the agreement of the advertisers in the sector³⁸.

VI. 3. 2. Germany

Surreptitious advertising is prohibited by the *Rundfunkstaatsvertrag* (RfStV) or Inter-State Treaty. Article 7 defines surreptitious advertising almost identically to the TWF Directive :

“the reference to or presentation of goods, services, names, trademarks or activities of a manufacturer of goods or of a supplier of services when such reference or presentation serves advertising purposes and can mislead the general public as to its real purpose. A reference or presentation shall be regarded as serving advertising purposes especially when it is made for remuneration or other consideration.”³⁹

Subliminal techniques are also banned, though not defined, in Article 7(3) of the RfStV.

VI. 3. 2. 1. Public broadcasting

Public broadcasters also forbid surreptitious advertising or product placement in their internal Codes of Practice⁴⁰. Aural or visual presentations of products are prohibited outside

³⁷ Provisional Decision 634/95 of the Regional Court of Bordeaux of 11 March 1995, *CIVB v TF 1, France 2 and France 3*, in *IRIS*, June 1995, Vol. I, 12.

³⁸ “*Principes relatifs à la télédiffusion sur les chaînes françaises d'événements sportifs se déroulant en France ou à l'étranger comportant des panneaux publicitaires en faveur des boissons alcooliques*”, in Annexe 7, “*La Loi du 10 janvier 1991, bilan après 5 ans d'application*”, *Enterprise et Prévention*, 1996.

³⁹ Article 7(5), *Rundfunkstaatsvertrag*, 26 August 1996, Bonn.

⁴⁰ Rule 5, *ARD-Richtlinien für die Werbung, zur Durchführung der Trennung von Werbung und*

commercial breaks, or in exchange for payment or other consideration. The exceptions include product placement for journalistic or cultural reasons, especially the depiction of real life, provided it avoids the promotion of advertising interests. These guidelines should also be taken into account in foreign and bought programmes that include product placement, especially when the broadcast of these programmes is essential. When products or money are given away as prizes in competitions, there shall be no preferential treatment of the products or their donation to winners. In these cases, the presentation of products must be strictly limited to editorial needs. Public broadcasters stress that the responsibility to comply with these guidelines lies at all levels of programme production⁴¹.

VI. 3. 2. 2. Private broadcasting

The *Werberichtlinien*, or joint guidelines of the *Landesmedienanstalten* for private broadcasters, state that the representation outside advertising breaks of commercial merchandise or of their manufacturers, or services or their suppliers, is only possible for significant editorial reasons, or to provide important information. This principle applies to in-house productions, co-productions, independent productions or purchased programmes. The regulators will apply objective criteria to determine when this presentation has an advertising purpose and can induce the public to misunderstand its intention. Product placement is intentional when it is made in exchange for payment or other consideration. When product presentation is allowed, editorial work shall seek to avoid favouring advertising interests⁴².

Programm und für das Sponsoring, 28 November 1994, in *ARD-Jahrbuch 1995*; Rule 5, *ZDF-Richtlinien für Werbung und Sponsoring*, 7 October 1994, in *MediaPerspektiven Dokumentation*, N° I, 1994.

⁴¹ Rules 5.1 to 5.8, *ibid.*

⁴² Rule 7(1) and (2), *Gemeinsame Richtlinien zur Werbung, zur Trennung von Werbung und Programm und für das Sponsoring in Fernsehen (Werberichtlinien)*, 8 November 1994.

The *Werberichtlinien* categorise product placement as surreptitious advertising because it blurs the separation between programme and advertising with its perceptible display of the product. Therefore, the placement of products that do not serve a distinct editorial or informational need means a prohibited influence on the programme. However, the presence of a superimposed logo, such as an electronic clock or computer during the coverage of sport events, especially when statistics or results are displayed, is not considered to be product placement⁴³.

The prohibition of product placement not only infringes Article 7 of the RfStV and Rule 7 of the *Werberichtlinien*, but also Article 1 of the Unfair Competition Law (UWG)⁴⁴. These infringements may result in warnings and sanctions by both *Landesmedienanstalten* and any competitors affected by the clandestine advertising. Article 1 of UWG states that every business concern involved in trade relations and activities with an advertising purpose shall be subject to sanction actions when the behaviour is against traditional habits and customs. This is understood to be behaviour contrary to general trade practices in the advertiser's sector, or against the general competition norms. Case law has also developed against such harmful behaviour⁴⁵.

When products are given as prizes or *Preisauslobung*, in game shows or quiz competitions, the product manufacturer can only be named twice, and the price can be superimposed twice for a short moment⁴⁶. This type of programmes is considered to be a long advertisement or *Dauerwerbesendung* if it lasts more than ninety minutes. It must be identified as such at the beginning and during the programme⁴⁷.

⁴³ MGM MediaGruppe (1995) *Deutsches TV-Werberecht*, München:MGM and Droste Rechtsanwälte, Section IV.

⁴⁴ General Clause 1, *Gesetz gegen den unlauteren Wettbewerb*, 27 July 1994 (UWG).

⁴⁵ MGM (1995) op. cit., Section II.

⁴⁶ Rule 13, *Werberichtlinien*, op. cit.

⁴⁷ Rule 6(2), *ibid.*

Sponsored programmes are banned from promoting the purchase of products, as mentioned in the previous chapter. Any invitation to buy or sell the sponsor's products is prohibited. For example, in the broadcast of sport events or cultural manifestations, the programme is likely to promote the purchase, sale or rental of the sponsor's, or a third party's, products and services, if they are obviously displayed on billboards or posters⁴⁸.

German private broadcasters are familiar with product placement activities and they have led to several warnings from the *Landesmedienanstalten*. In Spring 1997, SAT 1 was warned three times for undue product placement in the Bavarian regional programme⁴⁹. The issue was about a much-discussed SAT1 practice called *Refinancierung* designed to help finance less commercially appealing programmes. Also, in September 1996, RTL was the subject of discussion by its media regulator, the *Niedersächsische Landesmedienanstalt für privaten Rundfunk* (NLM), over its surreptitious advertising in children programmes⁵⁰. It was not the first time that NLM had warned RTL. In 1994, a soap-opera had several times shown the well-known advertising character for an insurance company. The regulatory authority had to prove that the product placement was not editorially justified and that payment had occurred⁵¹.

⁴⁸ Rule 9(6), *ibid.*

⁴⁹ "SAT 1 dreimal wegen Schleiwerbung gerügt", *epd medien*, N°27, 12 April 1997, 12.

⁵⁰ "Gericht-RTL betrieb Schleiwerbung in Kindersendung", *epd/Kirche und Rundfunk*, N°76, 28 September 1996, 13.

⁵¹ "NLM prüft Schleiwerbung für Versicherung in RTL-Serie", *epd/Kirche und Rundfunk*, N°5, 21 January 1995, 19.

VI. 3. 3. *Italy*

Italy has not transposed the European Union's ban on surreptitious advertising into its legal system. The Mammi Law, which transposed the TWF Directive's provisions into the Italian legislative system, bans subliminal techniques or ciphered messages⁵².

Under the Mammi Law, sponsored programmes were considered to be advertisements for the purposes of daily airtime allowances, and calculated as a minimum of two per cent of the duration of the sponsored programme. In other words, a minimum of two per cent of the sponsored programme's duration was to be added to normal advertising levels for the purposes of daily commercial airtime allowances. The Ministry of Post and Telecommunications was empowered by the Mammi Law to devise a more detailed regulation of the matter⁵³.

Like the Mammi Law, Ministerial Decree 439 of 4 July 1991 regulating sponsorship of television and radio programmes did not ban promotional references to the sponsor in sponsored programmes as required by Article 17(3) of the 1989 TWF Directive⁵⁴.

Among other things, the Ministerial Decree included in the concept of sponsorship the presentation of products or services, game shows, competitions or any other promotional activity, directly or indirectly inserted in a program⁵⁵. The norm made reference to a special form of promotion very common in Italian television at the time, *telepromozion*, which were a substantial source of finance for television services, especially local channels.

⁵² Article 15(9), Law 223 of 6 August 1990 on the regulation of the public and private television systems, Law Mammi, GU 185 of 9 August 1990.

⁵³ Article 8(15), Law 223/1990; subliminal techniques are also banned in Article 4(3), Legislative Decree 74/1992 of 25 January 1992 on misleading advertising, GU 36 of 13 February 1992.

⁵⁴ Ministerial Decree 439 of 4 July 1991, GU 19 of 24 January 1992.

⁵⁵ Article 3(f), Decree 439 of 4 July 1991.

Telepromotions in the Italian fashion are advertising messages or product promotions praising their characteristics, which are inserted almost fluently and implicitly by the presenter within the programmes. The practice was not new to the media, since it is widespread in the press, but it was an innovative and alternative source of funding for television.

The status of telepromotions was unclear and they were usually sold to advertisers as a form of sponsorship. In Italy, telepromotions were indistinguishable from the rest of the programme. They were an integral part of it and viewers were not warned of their promotional nature in any way. There was certainly a risk of their being regarded as surreptitious advertising or surreptitious sponsorship. Both the Mammi Law and Ministerial Decree 439/91 assimilated telepromotions to sponsorship, and applied quantitative limits to sponsorship as well as to conventional forms of advertising. The issue originated a debate which involved broadcasters, legislators and other vested interests in the advertising market, such as the press, which was concerned about the growth of television share of advertising expenditure.

The problem lay in classifying telepromotions. If telepromotions were considered a form of sponsorship, they would count towards advertising quotas. If they were a form of commercial communication different from sponsorship and from spot advertising, they could, in theory, benefit from the extra five per cent airtime allowance allocated to forms of advertising such as direct offers to the public⁵⁶.

⁵⁶ Article 18(1), Directive 89/552/EEC, "New Forms of advertising according to Council Directive 552/89", promotional brochure, Publitalia '80, Milan, 1994. For further discussion see Chapter VII.

In the meantime, the European Commission had urged the Italian government to align its legal system with the provisions of the 1989 Directive⁵⁷. Decree-Law 408 of 19 October 1992, later converted into Law 483 of 17 December 1992, issued a number of urgent norms and rules in the matter of television advertising and sponsorship⁵⁸. This second decree finally implemented in full Article 17 of the 1989 Directive. The quantitative limits on sponsorship disappeared, but Decree 408/92 still categorised telepromotions as advertising messages which counted towards airtime quotas. In 1993, the Commission clarified its position on the matter:

“Telepromotions are a legitimate form of advertising and subject to the provisions in the Directive on advertising. It is incorrect to state that telepromotions are contrary to the Directive. For the purposes of calculating the airtime allowance for telepromotions (...) the basis for calculation could be both the daily limit and the hourly limit. Both interpretations are compatible with the Directive, and it is not the role of the Commission to participate in what it considers to be a national discussion.”⁵⁹

Finally, Ministerial Decree 581 of 9 December 1993 regulating sponsorship of broadcast programmes and offers to the public was enacted to comply with the provisions of the 1989 TWF Directive, and to make the necessary amendments to Ministerial Decree 439/91. It excludes from programme sponsorship any presentation of the sponsor's products or services in both credits and trailers. In the case of game shows and viewers' competitions, the sponsor's products may be shown and mentioned when given as prizes, provided that no advertising slogans are mentioned or shown. In this case the presentation shall be punctual and unobtrusive and only at the moment of giving the prize. Other advertisers may provide products as well⁶⁰. The legislator chose to exclude telepromotions from sponsorship as it considered other forms of sponsorship not mentioned in the Ministerial Decree to be

⁵⁷ Letter to the Italian Minister of Foreign Affairs from M. Bangemann, Commissioner, SG(92), Brussels, 3 November 1992.

⁵⁸ Decree-Law 408 of 19 October 1992 co-ordinated with conversion Law 483 of 17 December 1992, establishing urgent provisions in television advertising, GU 297 of 18 December 1992.

⁵⁹ Commission of the European Communities, “Telepromotions and European Directive”, Press release IP(93) 396, Brussels, 24 May 1993.

⁶⁰ Article 4(4), Decree-Law 408/1992.

advertising messages⁶¹.

Ministerial Decree 581/93 was challenged by private broadcasters and consideration of telepromotions, and whether they were able to benefit from the extra airtime allowance, was referred to the ECJ⁶². The issues and judgement of the case will be discussed in the next chapter on direct offers to the public.

VI. 3. 4. Spain

At the time of the 1989 TWF Directive, the only normative text mentioning product placement was RTVE's circular of 23 October 1989 on "special advertising", which laid down guidelines and prices for the placement of prizes in *El Precio Justo*. RTVE considered product placement to be special advertising, different from spots and related to sponsorship. Commercial products or services were described and displayed during the game show in a promotional fashion. The conditions of this promotional presence were determined in contracts signed by RTVE's advertising department and advertisers. These would provide their products in exchange for prominence and promotion⁶³.

These guidelines were issued shortly after the adoption of the TWF Directive in October 1989, which was finally enacted in Law 25/1994 of 12 July 1994⁶⁴. The Law defines surreptitious advertising as any verbal or visual presentation, in a non sporadic or non-occasional fashion, of the goods, services, name, brand or activities of a manufacturer or service provider, when such presentation is intentional, with an advertising purpose, and

⁶¹ Article 4(5), *ibid*.

⁶² ECJ, Judgement of 12 December 1996 in Joined Cases C 320/94 and others, *RTI v Ministero*, 1996 ECR, I-6471.

⁶³ RTVE, Circular N° 179-B, *Programas extraordinarios, publicidad especial en el programa "El Precio Justo"*, Madrid, 23 October 1989.

⁶⁴ Law 25/1994 of 12 July 1994, BOE 166 of 13 July 1994.

could mislead the public about its real nature. Intentional means any product presentation in exchange for remuneration, whatever its nature⁶⁵. There is a difference between this definition which includes the phrase “non-sporadic or non-occasional” and that in the TWF Directive. The Spanish Law seems to introduce a restrictive element to the definition. The legislator has tried to exempt from the concept of surreptitious advertising the occasional and unintentional presence of brands, products or services which appear in audio-visual works, for example, a billboard featuring Coca-Cola within a film or television series, or a person invited to a programme wearing an advertising decorated T-shirt or smoking a branded cigarette⁶⁶. The concept of a “non-sporadic or non-occasional” sponsor’s reference is clearly subject to interpretation, both by broadcasters and regulators, since the Law does not provide measurable criteria. Private broadcasters consider the Law to be full of ambiguity⁶⁷. In practice, the Spanish rules allow the sponsor’s presence within the programme, whenever this presence is identified in the credits.

The definition explicitly excludes static presentations at public events organised by third parties whose broadcast rights have been transferred to a television service⁶⁸.

The Law also defines indirect advertising as that which does not directly mention the products, but uses trademarks, symbols or other distinctive features of companies whose main activities include the production or commercialisation of those products⁶⁹. Broadcasters consider that this definition is very confusing and they understand it to refer to advertising that is an integral part of a programme, e.g. game shows and viewers’ competitions. In these

⁶⁵ Article 1(c), Law 25/1994.

⁶⁶ Bufete Santiago Muñoz Machado (1995) *Código de comportamiento y de interpretación de las normas para la contratación y emisión de publicidad en televisión*, brochure distributed to private broadcasters, March, 21.

⁶⁷ Javier Rodríguez, Antena 3, interview in Madrid, September 1995.

⁶⁸ Article 1(c), Law 25/1994.

⁶⁹ Article 1(d), *ibid.*

programmes, product presence could be considered as non-essential⁷⁰.

Subliminal techniques are considered to be illicit advertising and are prohibited⁷¹. The General Law on Advertising 34/1988 of 11 November had already declared illicit the categories of subliminal, misleading and dishonest advertising⁷².

“Subliminal advertising is that which, by producing stimuli of intensities similar to the threshold of the senses, could influence the public without it being consciously perceived.”⁷³

Article 10 of the Transposition Law specifically prohibits any direct or indirect advertising of cigarettes or other tobacco products on television⁷⁴. Indirect advertising is otherwise not specifically prohibited in the Law. Surreptitious advertising is prohibited, however⁷⁵.

Spanish television channels regularly centre programmes around a particular product, and the theme of those programmes may be featured throughout the schedule, by phone-in competitions based around the programme’s theme, or by using promotional devices outside the programme⁷⁶.

According to the Spanish Association of Advertisers, product placement should be a legal form of commercial communication in television, as long as it is properly identified. According to them, the market would tend to regulate itself, and excessive advertising would damage the industry as much as annoy the viewers⁷⁷.

Surreptitious product placement is widely used to publicise banned or regulated products

⁷⁰ Javier Rodríguez, Antena 3, interview in Madrid, September 1995.

⁷¹ Article 9(2), Law 25/1994.

⁷² Article 3(b), (c) and (d), General Law on Advertising 34/1988 of 11 November, BOE 274 of 15 November 1988.

⁷³ Article 7, *ibid.*

⁷⁴ Article 10(2), Law 25/1994.

⁷⁵ Article 10(1a), *ibid.*

⁷⁶ Michael Barrett (ed.) (1994) *Antenna 94, the broadcast sponsorship report*, London, 119.

which could not otherwise be advertised. Advertisements for alcoholic drinks of more than twenty degrees, which are banned from television, find their way on screen via static billboards at broadcast events, through ancillary brands, especially because the Law does not consider these static advertisements to be surreptitious advertising. There are no criteria in the Law on how to quantify the involvement of the broadcaster and to what extent it has or has not received remuneration for this indirect presence⁷⁸.

VI. 3. 5. UK

VI. 3. 5. 1. Subliminal techniques

The Broadcasting Act of 1990 defines subliminal techniques as:

“ ... any device which, by using images of very brief duration or by another means, exploits the possibility of conveying a message to, or otherwise influencing the minds of, persons watching the programmes without their being aware, or fully aware, of what has occurred”.⁷⁹

These techniques are banned in the ITC Code of Advertising Standards and Practice (CASP)⁸⁰.

⁷⁷ David Torrejón, Spanish Association of Advertisers, interview in Madrid, December 1995.

⁷⁸ *Asociación de Usuarios de la Comunicación, La publicidad en televisión*, brochure, Madrid, 1996.

⁷⁹ Broadcasting Act 1990, Section 6, Subsection 1(e)

⁸⁰ Rule 7, ITC Code of Advertising Standards and Practice, Summer 1997.

VI. 3. 5. 2. Surreptitious advertising

It is a basic principle of the ITC that advertisements and programmes are kept separate⁸¹. Article 5 of the CASP ensures that distinctions between advertisements, programmes and programme trailers, and between advertisements and sponsorship credits, are clear to viewers.

Within the framework of sponsorship regulation, the ITC Code of Programme Sponsorship (CPS) extends a ban on surreptitious sponsorship. The ban falls under the rules on sponsor credits, to safeguard the transparency requirements in sponsorship⁸². Credits must not feature the sponsor's branded product, whether packaged or not, nor any representation of their product or service. In no circumstances may a specific product or service benefits be referred to or shown⁸³. This particular rule is connected to the ban on product placement extended in Rule 12.1 by the CPS. Other specific rules on sponsor credits have already been mentioned in Chapter V of the thesis.

VI. 3. 5. 3. Product placement: prizes in game shows and viewers' competitions and undue prominence

VI. 3. 5. 3. a. Product placement in ITC licensees

Product placement is banned. The CPS defines product placement as the inclusion or reference to a product or service within a programme in return for payment or other valuable consideration to the programme maker or ITC licensee. Where their use is clearly justified editorially, products or services may be acquired at no, or at less than, full cost, but the

⁸¹ Rule 5(a), *ibid.*

⁸² Rule 8.1, ITC Code of Programme Sponsorship, March 1997.

provision of the product must not be conditional on the manner of its appearance in the programme. A basic text lasting no more than five seconds may be included within the end credits for the product placed⁸⁴.

It is very difficult to prove whether any transaction has taken place. In trying to assess the editorial justification of product presentation, attention should be paid to whether the product gains a competitive advantage from its presence in the programme. The ITC Programme Code bans the undue prominence of commercial goods and services, even if editorially justified, in programmes of any kind, whether sponsored or not⁸⁵.

“No undue prominence may be given in any programme to a commercial product or service. In particular, any reference to such a product or service must be limited to what can clearly be justified by the editorial requirements of the programme itself”.⁸⁶

The ITC issued several formal warnings to the ITV company Granada Television for undue prominence relating to viewers' competitions during 1993 and 1994⁸⁷. Early in 1995 the ITC fined Granada £500,000.

Section 11 of the CPS establishes guidelines for advertisers and sponsors' references in game shows and viewers' competitions. In game shows, the sponsors may also donate prizes, which may be their own products and services. There may be two mentions of either the prize, brand, the name of the sponsor or the donor of the main prize only. There may also be a brief reference to the product itself, which may include a visual display usually for no longer than five seconds. The reference should not praise the product. Trailers, or reminders for game shows, may not contain brand references. End credits are possible for donors or prizes that have not been identified within the programme. In the case of viewers'

⁸³ Rule 8.7, *ibid.*

⁸⁴ Rule 12, *ibid.*

⁸⁵ Rule 10.1(i), ITC Code of Programme Sponsorship, March 1997.

⁸⁶ Rule 10(6), ITC Programme Code.

⁸⁷ ITC News Release, 77/94, ITC issues formal warning to Granada Television, 21 November 1994.

competitions, the broadcaster has to retain full control and the competition must occur within the body of a programme or as part of programme promotion. Competitions cannot stand alone as programmes in their own right. If a competition is not part of a programme, it must neither be broadcast during advertising minutage or in a programme or station promotion, and if it is broadcast during advertising time, the CASP should apply. On the other hand, if the competition is broadcast as part of a programme or station promotion, then the CPS rules on trailers should apply⁸⁸.

Advertisers may donate prizes and these may be their own. Where editorially justified, there may be a single mention of the brand of the main prize or prize donor with a brief reference to the product, normally no longer than five seconds in duration. However, sponsors may not donate their own products or services as prizes in competitions they are sponsoring. This is to preserve the editorial integrity of the sponsored programme⁸⁹. Descriptions should avoid promotional statements. Prizes may not be branded products mentioned elsewhere in the programme, except for prizes connected with programme items concerned with spots and music events, film, music, video, theatre and book reviews.

Questions should not refer to the products or services of the prize provider, except again music, film, video, theatre and book reviews. Trailers or programme promotions containing competitions may not contain brand references. Broadcasters and advertisers believe that the same reasons which apply to allowing prize references in programme competitions apply to trailers for competitions. Product references would alert viewers to the product make so as not to mislead them into entering a competition, to discover that the prize was not what they expected⁹⁰. In the case of a competition directly related to the sponsor of a broadcast event,

⁸⁸ ITC Sponsorship Guidance Note N°1- Viewers' Competitions, attached to "Review of ITC Code of Programme Sponsorship", Explanatory Memorandum, 20 September 1996.

⁸⁹ *ibid.*

⁹⁰ The ITC Licensees' Sponsorship Group, *op. cit.* 19.

and where the sponsor's name is part of the title of the event or the broadcast, that title may be included in the name of the competition. Finally, if a prize donor has not otherwise been identified during the programme, end credits of a maximum of five seconds may be included⁹¹.

The close similarity between a programme's content and advertising might constitute an unacceptable promotional message, transforming the sponsorship of a programme into prohibited sponsorship.

VI. 3. 5. 3. b. Product placement in the BBC

Product placement is forbidden in BBC programmes. References to trade and brand names should be avoided and made only if editorially justified. No undue prominence should be given to any product or service. When featuring branded products, the BBC cannot give the impression that the programme is being influenced in any way by a commercial concern. No BBC programme must ever accept reduced cost or free products or services in return for an on-air credit or verbal reference to the provide⁹².

Consumer programmes using products should under no circumstances give the impression that the BBC is promoting any particular service or product. If, for editorial reasons, one product or service is reviewed in detail, there should be reference to others that are comparable. The Producers' Guidelines lay down provisions for the manner in which books and magazines should be mentioned⁹³.

In prizes and games, the BBC should not offer prizes of branded products referred to

⁹¹ Rule 11.2 (i) to (x), ITC Code of Programme Sponsorship, March 1997.

⁹² BBC Producers' Guidelines, November 1996, London, Chapter 31.

editorially elsewhere in the programme. Questions in quizzes and game shows should not refer to any branded goods provided as prizes. The name of the product supplier should not normally be given and the brand name should be mentioned only if it is strictly necessary editorially. Only one reference should be made. Brand logos should be avoided⁹⁴.

VI. 3. 5. 4. Coverage of sponsored events

VI. 3. 5. 4. a. Coverage of sponsored events by ITC licensees

Section 13 of the CPS is dedicated to coverage of events. Advertising at events must be limited to what can clearly be editorially justified. Advertising is acceptable provided the event has a non-television status, that is, the development and running of the event is done by an organisation different from the television company, and from advertising and promotional interests. Television coverage must not be the principal purpose of the event, and the event must be open to members of the public. On-site advertising and branding arrangements are otherwise a matter for agreement the organising body and the broadcaster⁹⁵.

Aural and visual reference to the sponsors of an event should be enough to identify them, but they must be justified by the editorial needs of the programme itself. When not identifiable otherwise, recognition of the sponsors and not lasting more than five seconds may be included within the end credits, except for those cases prohibited under the CPS rules on sponsorship credits⁹⁶.

Coverage of tobacco-sponsored events or events at which there is advertising for any tobacco

⁹³ *ibid.*, Chapter 32.

⁹⁴ *ibid.*, Chapter 33.

⁹⁵ Rule 13.2, ITC Code of Programme Sponsorship, March 1997.

⁹⁶ Rule 13.3 *ibid.*

company, must be consistent with the Voluntary Agreement reached between the Minister for Sport and the Tobacco Manufacturer's Association on 31 January 1995, or any later modification⁹⁷. The agreement and Code of Practice are valid until June 1999, with provision for amendment in the light of any European Community regulation affecting this issue.

The agreed Code of Practice establishes requirements in relation to all media advertising for signs and billboards in sport events sponsored by tobacco companies⁹⁸. Static signs at televised events may be covered up by the television authorities. Signs stating the name of a sponsored sporting activity may be displayed at the venue but they should not be located within camera sightlines for prolonged, uninterrupted periods. They should not be placed on or at scoreboards, set playing positions or areas that are likely to come within the scope of the television cameras, or between a participant and the camera. If signs come under the scope of the camera, the coverage should carry only the official title of the event or activity and the Chief Medical Officer's Warning. The sponsor's name should not be given more emphasis than the rest of the title. Annex A in the Code sets out the maximum number and size of signs depending on the sporting activity⁹⁹. The display of house or brand names or symbols on participants and officials, their vehicles, equipment and/or animals likely to come within the scope of television is not permitted during a televised activity in the UK. Incidental furniture and accessories bearing brand identification will not be exposed on television¹⁰⁰.

In 1997, with the advent of virtual advertising the ITC issued a guidance note. The ITC required in the note that special precautions be taken to safeguard the broadcaster's editorial

⁹⁷ Article 13.4, Fourth Agreement on Sponsorship of Sport by Tobacco Companies in the UK and the Minister of Sport, Department of National Heritage, (08/95), 31 January 1995.

⁹⁸ Articles 7 and 8, Code of Practice Governing Sponsorship of Sporting Activities by Tobacco Companies in the UK, Appendix 1 of the Voluntary Agreement, 31 January 1995.

⁹⁹ Article 12 (a), (b) and (c), Annex A, *ibid.*

¹⁰⁰ Articles 13 and 14, *ibid.*

control over the programme¹⁰¹. The use of these systems should be made transparent to viewers, either at the end or beginning of the broadcast. A special message should explain that the purpose of the system is to replace some of the real advertising billboards with advertising aimed at the UK. Systems may not be used to place advertising additional to what is already present at the event. Moving images can only be used to replace billboards which are animated. The guidance note also bans “virtual advertising” of tobacco products. Finally, the licensee must have the contractual right to refuse to carry virtual signals and it must not be involved in any way in selling virtual advertising to advertisers or their agents.

VI. 3. 5. 4. b. Coverage of sponsored events by the BBC

The BBC also covers sports and other outside events which are supported by sponsorship. Chapter 30 of the BBC Producers’ Guidelines is dedicated to this issue. The BBC can take no money from sponsors, and the contract has to be with the event organiser, not with the sponsor. In co-produced events, sponsors cannot pay for the broadcast coverage. The BBC does not necessarily use the name of the sponsor’s event in the title of television coverage. The BBC has to make it clear that it is the event that has been sponsored and not the broadcast. Normally, the prime sponsor will be credited, with a maximum of two verbal credits in a non-promotional style. There may also be a single visual reference in end credits, but the sponsor’s logo should not be used. Coverage of tobacco-sponsored events is also regulated under the Voluntary Agreement mentioned above between tobacco manufacturers and the government¹⁰².

¹⁰¹ ITC, Guidance Note to the 1997 Code of Programme Sponsorship, “Electronic imaging systems or “virtual advertising”, August 1997.

¹⁰² BBC Producers’ Guidelines, November 1996, London, Chapter 30.

VI. 4. Conclusions

Subliminal techniques are banned across the five countries studied. Although not defined in the TWF Directive, Spain and the UK include in their legal systems a definition of such techniques. France, Germany and Italy ban them without a proper definition. The comparative analysis in the five countries studied shows that surreptitious advertising is understood and regulated differently. The underlying principle in the TWF Directive, that of the separation of advertising content and programme content governs the regulation of surreptitious advertising. This regulation centres on the problem of product placement, and the criteria to define where such a placement is editorially justified.

The differences in interpreting the concept at the national level appear in how much the presence of products within programmes is deemed to be advertising influence and is a threat to the editorial freedom of broadcasters. If the CoE definition is accepted, as in the case of France, product placement is surreptitious when it serves all advertising purposes. On the other, the TWF Directive qualifies the presence of products as intentional, in return for payment, for surreptitious purposes. Germany and Spain, following the TWF Directive consider the existence of payment is a fundamental element in the classification of product placement as surreptitious. Italy and the UK do not define surreptitious advertising. However, the UK includes a definition of product placement, which is banned. The UK also bans surreptitious sponsorship, that is, sponsorship that is not credited.

In Germany and in Spain product placement could be possible, if it is editorially justified, which must be a subjective concept. The UK has tried to qualify this editorially justification, by introducing a further requirement: When product placement is editorially justified, it must

not be given undue prominence. German broadcasters have been often fined by the *Landesmedienanstalten* for breaching of “undue prominence”.

In general, the only moment when products are allowed is in game shows and viewer’s competitions when they are given as prizes. There are detailed differences across countries on how the products can be shown and their brands mentioned. In France, for example, the sponsor’s products may be mentioned twice, but the brand of other advertisers’ products cannot be mentioned. If the brand is mentioned, the product may only belong to the sponsor. It is different in the UK, where the sponsor is only allowed to give prizes in the game shows that it sponsors, but not in viewer’s competitions. Products can be shown in such programmes, provided that there are no advertising slogans, praise for the products or invitations to purchase them. In Germany, the prizes’ manufacturers can be shown twice. Italy allows prizes in game shows and quizzes, and the prize won may be displayed if the mention is punctual. Spain allows the sponsor’s presence within the programme provided that it does not disrupt the normal progress of the programme, and in practice, this provision also extends to product placement.

Rules about viewers’ competitions and the regulation of promotional references to advertisers and their products will become even more crucial as television moves to pay per view and digital services, in which interactivity will make it easier for product providers to reach viewers, and in which viewers would be able to make informed choices. Viewers’ competitions in particular are a good promotional tool to increase viewer loyalty to broadcasters.

In the coverage of events, static advertising is explicitly excluded from surreptitious advertising. In France, the ban on television advertising for alcoholic drinks has been under review by the European Commission. Billboards for alcohol producers are deemed to be surreptitious advertising, or better, prohibited sponsorship. The coverage of sponsored events affects public broadcasters, for example, in the UK, where the BBC does not accept advertising as a general rule, but broadcasts sponsored events, especially sports. The issue is whether the broadcaster receives payment from the sponsor's event, in return for television exposure in the case of "sensitive" products, or of products that are banned from television advertising.

A key issue has proved to be the definition of telepromotions in Italy, since the national legislator chose to adopt stricter rules than those in the TWF Directive and included them in airtime quotas. They were considered to be surreptitious product presentations, and an invitation to buy the products praised. Telepromotions are also common in Spain. They will be discussed in Chapter VII.

Virtual advertising is still at its infancy. It offers advantages for advertisers such as geographically-targeted communication and increased sponsorship income from the broadcast of events. However, it presents problems for the protection of the editorial independence of broadcasters. It also can be used to increase the presence of advertisers within programmes. At the European level there has been some concern, and the EBU and the ACT have drawn up a Code of Conduct. At the time of writing, only the UK had introduced some guidelines for the use of virtual advertising by national broadcasters.

CHAPTER VII

DIRECT OFFERS TO THE PUBLIC

VII. 1. Introduction

Since the adoption of the 1989 TWF Directive, new forms of commercial communication have increased their role as complementary income for advertising-funded broadcasters. When the 1989 TWF Directive was approved, teleshopping, one of these new forms of commercial communication, was in its infancy, but has grown rapidly in importance. In 1987, Sky Channel was already broadcasting one hour per day of English-language teleshopping programming on a pan-European basis, and in France and Italy, broadcasters were already carrying teleshopping programmes¹.

The 1989 TWF Directive did not define “direct offers to the public”. It excluded them from television advertising, and only mentioned them in Article 18 for the purposes of setting restrictions on advertising airtime. Neither did the 1989 text include “direct offers to the public” under the provisions governing regular advertising, e.g. the principles of differentiating advertising from programming, the number and position of breaks, the content of messages, or the prohibition on advertising tobacco and medicines under prescription. The logical interpretation would have been to include these forms within the scope of these provisions for advertising but this standpoint was not adopted until the 1997 text.

Although the phrase “direct offers to the public” has been generally understood to mean “teleshopping”, it may also designate other forms different from traditional advertising. The advertising sector considers teleshopping to be a type of sale and not a form of advertising or

commercial promotion. For this reason, teleshopping should not be regulated under the rules governing advertising but under competition law and consumer protection. The commercial nature of teleshopping is fundamental when deciding whether or not to apply airtime limits. The 1989 TWF Directive was not clear whether teleshopping was a type of programme or a form of advertising which should be included in airtime limits, and the wording of the TWF Directive could not prevent the licensing of dedicated teleshopping channels.

In recent years, teleshopping has become common in both public and private television channels of Member States of the European Union, and its development could not be excluded from the scope of the TWF Directive. The new Directive on Distance Selling will also affect how these practices are undertaken across the European Union². This Directive covers most transactions between suppliers and consumers for goods and services concluded at a distance as part of a sale or service provision. It establishes sales requirements for the consumers' right of information and protection, which will affect teleshopping sales transactions.

Teleshopping is not the only blurred area in the categorisation of the 1989 TWF Directive. Other forms of promotion involving a direct offer to the public are telepromotions, infomercials, direct response advertising and long advertisements. These forms of publicity cross the boundaries between television advertising and sponsorship. The different regulatory solutions show the difficulty and diversity in understanding these new forms of promotion.

¹ CoE (1991) *Mass Media Files*, No 9, Strasbourg, 60.

² European Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144 of 4 June 1997, 19.

VII. 2. Areas of discussion

VII. 2. 1. Teleshopping

Teleshopping did not benefit from a proper definition in the European legal texts. In 1982, the ECJ had defined the technique of “telesales” or “telemarketing” as the activity whereby an advertiser places in television an advertisement carrying a telephone number which the audience may then call to obtain information on the product offered or to respond to the advertising campaign in some other way³.

In 1989, the CoE Convention on Transfrontier Television included teleshopping within the definition of advertising. The Explanatory Report stated that new forms of promotion such as teleshopping, containing direct offers for the sale or rental of products or the provision of services over the air were covered by the definition of advertising⁴. Article 12(1) and (3) of the CoE Convention on Transfrontier Television which referred to direct offers to the public such as teleshopping, set daily and hourly limits for them. The objective was to ensure that the transmission time devoted to advertising was not excessive, but at the same time to respect the informational role of television. The CoE Convention allowed for a further five per cent of transmission time per day on top of the fifteen per cent for spot advertising, for teleshopping and other new forms of advertisements, which are generally more time-consuming than spot advertisements. It also set a maximum limit of one hour a day in order to avoid an excessive amount of new forms of advertising during any one day⁵. Teleshopping was later described by the CoE as “on-air” direct offers to the public. Viewers could then

³ ECJ, Judgement in C-311/84 of 3 October 1984, *Centre Belge d'études de marché-télémarketing sa vs. CLT sa and Information Publicité Bénélux sa.*, 1985 ECR, 3261-3279.

⁴ Council of Europe (1989) Explanatory Report to the European Convention on Transfrontier Television Strasbourg, 5 May 1989, paragraph 67.

place their order with a dealer by mail or telephone or videotext. A teleshopping operation involved a salesperson who provided the goods and took responsibility for them, a position that may be assumed by either the broadcaster or the producer. Teleshopping did not fall within the general definition of programmes, according to the CoE, because of its commercial element⁶.

The 1989 TWF Directive excluded direct offers to the public from the definition of television advertising except for the purpose of daily airtime limits, identical to those in Article 12 of the CoE Convention⁷.

“The amount of advertising shall not exceed 15 per cent of the daily transmission time. However, this percentage may be increased to 20 per cent to include forms of advertisements such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, provided the amount of spot advertising does not exceed fifteen per cent.”⁸

Broadcasters are free to allocate the extra five per cent in the way that best suits them, but spot advertising must not exceed fifteen per cent.

There are several types of teleshopping features. Teleshopping spots, i.e. teleshopping features with a spot format, teleshopping windows or broadcasts, i.e. a series of longer teleshopping features, usually broadcast on generalist channels, and dedicated teleshopping channels. The distinction is crucial in determining which category counts towards which airtimes under Article 18(1) and (3). Teleshopping spots are usually assimilated to the spot advertising airtime daily allowance of fifteen per cent. It is not clear whether the limit of twenty per cent per hour applies in this case or not. The 1989 TWF set a maximum of one

⁵ Article 12(1) and (3), Council of Europe (1989) European Convention on Transfrontier Television, and Explanatory Report to the European Convention on Transfrontier Television, paragraphs 168, 169, 170, 173, 174 and 175.

⁶ Council of Europe (1991) *Mass Media Files N°9*, op. cit., paragraphs 341, 342, 343.

⁷ Article 1(b), Council Directive 89/552/EEC of 3 October 1989, OJ L 298 of 17 October 1989.

⁸ Article 18(1), Council Directive 89/552/EEC of 3 October 1989.

hour a day for teleshopping windows, and excluded them from the hourly percentage restrictions.

The interpretations vary according to whether the phrase “such as direct offers to the public” is understood as introducing one amongst many examples, or as determining the unique meaning of “new forms of advertising” as direct offers to the public. The practice shows that the meaning of “such” leads to the interpretation of “direct offers to the public” as just an example of other forms of advertising. Both the European Court of Justice and the Commissioner for Culture however, have taken the view that teleshopping is a form of advertising subject to Article 18. In this case, more liberal rules on teleshopping would be welcomed by generalist channels⁹.

The application or otherwise of the maximum airtime limit of one hour a day in the 1989 TWF Directive for direct offers to the public was crucial for the existence of dedicated teleshopping channels. According to the 1989 TWF Directive’s definition of advertising, a broadcast advertisement only constitutes television advertising if it is broadcast in return for payment or for similar consideration. Dedicated teleshopping channels only broadcast information for their own commercial benefit, so no third party pays to broadcast its teleshopping features.

The European Commission acknowledged that the system of applying restrictions only to teleshopping without a proper definition, presented problems for its application. In 1994 several complaints were referred to the Commission regarding the failure of certain satellite television channels licensed in one Member State, and therefore liable to be freely received

⁹ Commission of the European Communities, OJ C 74 of 25 March 1995, 2, quoted in “Italy: Reference for a preliminary ruling of Court of Justice of the European Communities”, *IRIS*, May 1995, Vol. I, 9.

in the others, to comply with these restrictions. The Commission emphasised that the development of teleshopping should be encouraged as it was highly valued by consumers¹⁰.

The revised TWF Directive amends several of these points; it introduces a definition of teleshopping and considers it as a separate category subject to the advertising provisions. Teleshopping means direct offers to the public with a view to the supply of goods and services, in return for payment. The 1997 TWF Directive also includes teleshopping under the general provisions that govern television advertising content and scheduling. Tobacco advertising is banned from teleshopping. Teleshopping for medicinal products subject to market authorisation, and for medical treatments, is prohibited. The 1997 TWF Directive provisions on sponsorship apply to teleshopping, it lays down more lenient airtime limits and allows dedicated channels to exist. Windows devoted to teleshopping by channels not exclusively devoted to teleshopping shall be of a minimum uninterrupted duration of fifteen minutes. The maximum number of windows per day shall be eight. Their overall duration shall not exceed three hours a day, and teleshopping has to be clearly identified by optical and acoustic means¹¹.

VII. 2. 2. Telepromotions

As mentioned in the previous chapter, telepromotions are the televised promotion of a product or a service by means of a short game or a detailed product presentation. They

¹⁰ Commission of the European Communities (1995) Report on application of Directive 89/552/EEC, COM(95) 86 final, Brussels, 31 May 1995, 23.

¹¹ Articles 1(f), 10 to 18(bis), European Parliament and Council Directive 97/36/EC of 30 June 1997, modifying Directive 89/552/EEC, OJ EC L 202 of 30 July 1997.

usually last longer than spot advertising and are therefore difficult to include within the maximum airtime ceiling specified in Article 18(1) and (3)¹².

Telepromotions are considered by the Commission to be a legitimate form of advertising in principle and therefore subject to the TWF Directive's provisions on advertising¹³. As explained in earlier chapters of this thesis, the Italian *Tribunale Amministrativo Regionale del Lazio* asked the ECJ for a preliminary ruling about the status of telepromotions under the TWF Directive. Was the expression "forms of advertisements such as direct offers to the public" in Articles 1(b) and 18 of the TWF Directive to be understood as also covering other forms of advertising? It was an important practical question for Italian television and the applicability of Italian national rules in the matter, since the allowed extra five per cent of daily transmission time could be made available for other more time-consuming forms of promotion than spot advertisements, such as telepromotions.

In 1996, the ECJ ruled that the expression "forms of advertisements such as direct offers to the public" was used in the context of the Community rules, with regard to the possibility of increasing maximum advertising time to twenty per cent of daily transmission time, by way of example. Direct offers to the public were a form of broadcast presenting products which may then be ordered directly by telephone, mail or videotext, and, as mentioned before, are significantly longer than spot advertisements¹⁴.

¹² ECJ, Judgement of 12 December 1996 in Joined Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, *Reti Televisive Italiane SpA (RTI) v Ministero delle Poste e Telecomunicazioni*, 1996 ECR, I-6471.

¹³ Joao de Deus Pinheiro, European Commissioner for Audio-visual Policy, in Commission of European Communities, *Telepromotions and European Directive*, Press release IP(93)396, Brussels, 24 May 1993.

¹⁴ European Court of Justice, Judgement of 12 December 1996 in Joined Cases C-320, 328, 329, 337, 338, 339/94 *RTI v Ministero*, 1996 ECR, I-6471.

VII. 2. 3. Infomercials

Infomercials consist of a long advertisement with a strong product information content. Their assimilation to spot advertising is difficult to support from a commercial point of view because of their long duration. Infomercials are assimilated to teleshopping when they include an offer of sale or purchase of a product via a telephone number tagged at the end of the broadcast. A series of infomercials usually constitutes teleshopping programmes or windows.

The Council of Europe expressed their viewpoint on the nature of infomercials in the Opinion adopted by the Standing Committee on Transfrontier Television at its meeting in November 1995¹⁵. The Committee had been asked by a Delegate about the legal framework of infomercials in relation to the CoE Convention. The Standing Committee found that infomercials are compatible with the CoE Convention, and are covered by the definition of advertising in the CoE Convention:

“Advertisement means any public announcement intended to promote the sale, purchase or rental of a product or service, to advance an idea or to bring about some other effect desired by the advertiser, for which transmission time has been given to the advertiser for remuneration or similar consideration.”¹⁶

In the Committee’s view, the aim of an infomercial was clearly to promote the sale, purchase or rental of a product or service though with a strong informational character. Infomercials were therefore subject to the advertising rules in the CoE Convention, and especially the length, form and presentation of advertising¹⁷.

¹⁵ Council of Europe (1997) Opinion adopted by the Standing Committee on Transfrontier Television at its 7th Meeting, 21-22 November 1995, in *Opinions adopted by the Standing Committee, T-TT, (97) Inf. 2*, Strasbourg, September.

¹⁶ Article 2(f), CoE (1989) Convention on Transfrontier Television, op. cit.

¹⁷ CoE (1995) op. cit.

VII. 2. 4. Direct response advertising

The 1989 TWF Directive does not mention direct response advertising. The practice consists of a spot with a response mechanism such as a coupon, address, or telephone number, to enable consumers to react in order to buy a product or to request further information that may result in a purchase. It may be considered as a form of distance sale that uses television as a medium.

The differences between direct response advertising, teleshopping and infomercials are nation-based, because they do not find a proper definition in the European texts. The regulation of these forms had to adapt to national commercial practices as well as to the lack of status in the European legal framework

VII. 3. National legislation

VII. 3. 1. France

Teleshopping programmes started in France in early 1987. The legal framework was first stated in Law 88-21 of 6 January 1988¹⁸. It enacted the principal rules on distance selling designed to protect the consumer and instructed the CNCL, the regulatory body at the time, to fix within a month the rules for the broadcast of programmes presenting or promoting products or services, offered to be purchased on radio or television¹⁹. Teleshopping was defined as programmes totally or partially dedicated to the presentation or promotion of objects, products or services being offered directly to be purchased through radio or

¹⁸ Law 88-21 of 6 January 1988, JO of 7 January 1988, 271.

¹⁹ Law 88-21 of 6 January 1988; interview with Serge Ladhuie, CSA, Paris, June 1996.

television services²⁰. The CNCL Decision 88-36 of 4 February 1988, and its subsequent modifications by the CNCL and the CSA, fixed the first set of rules governing teleshopping applying to licensed terrestrial television and radio services²¹. Public broadcasters are therefore not allowed to carry teleshopping²².

Teleshopping broadcasts could last for a minimum of fifteen minutes and could not exceed ninety minutes a week. They could only be broadcast from 8.30 a.m. to 11.30 a.m. or at night after the end of other programmes, excluding Sunday²³. Decision 88-261 of 3 June 1988 reduced the minimum length of teleshopping programmes from fifteen to thirteen minutes²⁴. Again, a new CSA Decision 90-922 of 11 December 1990 changed the times of transmission to between 0 h and 11 h, excluding Sundays, and introduced a maximum limit of one hour a day to comply with Article 18(3) of the 1989 TWF Directive²⁵.

In 1992, the CSA again relaxed its provisions. It reduced the minimum time for teleshopping programmes from thirteen minutes to ten, established an upper limit of 120 minutes per week increasing it from ninety, and opened up broadcasting times, to between 00.00 h to 11.00 h and 14.00 h and 16.00 h. The daily maximum time was set at one hour a day, but transmission is still banned on Saturdays and Wednesdays afternoon, and on Sundays²⁶.

Teleshopping programmes are to be clearly identified as such and must not be interrupted by advertising breaks. They shall be broadcast in special slots and presented so as to avoid

²⁰ CSA (1996) *Réglementation et régulation audiovisuelles en France*, January, 88.

²¹ CNCL Decision 88-36 of 4 February 1988 fixing programming rules for teleshopping, JO of 10 February 1988, 1985; CNCL Decision 88-261 of 3 June 1988 modifying Decision 88-36 of 4 February 1988, JO of 18 June 1988, 8159; CSA Decision 90-922 of 11 December 1990 modifying Decision 88-36 of 4 February 1988, JO of 19 January 1991; CSA Decision 92-972 of 20 October 1992 modifying CNCL Decision 88-36 of 4 February 1988, JO of 11 November 1992, 15558.

²² Article 2, Law 88-21 of 6 January 1988.

²³ Article 2, CNCL Decision 88-36 of 4 February 1988.

²⁴ Article 1, CNCL Decision 88-261 of 3 June 1988.

²⁵ Article 1, CSA Decision 90-922 of 11 December 1990.

confusion with other programmes. Teleshopping features shall not be part of programme announcements²⁷. The trademark and name of a product manufacturer, distributor or of a service provider, offered for sale must not be shown, mentioned or indicated on screen, nor shall they appear in an advertisement or publication referring to the teleshopping programme. The trademark of the product and name of the provider may only be stated once the order is placed²⁸.

The price and conditions of purchase have to be clear and must not lead to any misunderstanding on the agreement, whether the order has been placed through telephone, post or by any other medium. As for content, teleshopping broadcasts shall not offend decency and respect for the human being; they must not offend the religious, political or philosophical convictions of listeners or viewers. Children may not take part in these broadcasts. The presentation of the products shall comply with legislation and statutory provisions, and shall not be misleading. Presenters shall ensure that the quality, size and weight of the product is faithfully reproduced in the images broadcast. These broadcasts must not take place in a sales outlet that is clearly identifiable. Finally, the sale of products, the advertising of which is prohibited by a legislative or statutory provision, is also prohibited²⁹.

Teleshopping distributed via cable television services is regulated by Decree 92-887 of 1 September 1992 modified by Decree 95-77 of 24 January 1995³⁰. The CSA defines the obligations in the matter of teleshopping for cable broadcasters case by case in their agreed contracts. Rules for cable services are less strict than those for terrestrial channels. Teleshopping programmes must not offer products or services banned from television

²⁶ CSA Decision 92-972 of 20 October 1992.

²⁷ Article 2, *ibid.*

²⁸ Article 7, CNCL Decision 88-36 of 4 February 1988.

²⁹ Articles 5, 6, 8 and 9, CNCL Decision 88-36 of 4 February 1988.

³⁰ Decree 92-882 of 1 September 1992 regulating radio and television services distributed via cable, modified by Decree 95-77 of 25 January 1995 JO 25 January 1995, 1339.

advertising, they must be clearly identified as such and must not lead to confusion with other programmes. The trademark and name of the product provider and distributor must not be designated until the moment of placing the order. The presentation of goods and services for sale must respect consumers' interests and must not contain false allegations or induce the consumer to error. Quantitative and qualitative elements in the offered goods and services shall be described in the most precise way. Persons younger than sixteen years of age must not appear in these programmes³¹. Finally, teleshopping programmes will last for at least ten minutes for a maximum of one hour a day and shall not be interrupted by advertising breaks³².

The cable decree defined dedicated teleshopping channels as those that devote at least fifty per cent of their transmission time to teleshopping programmes. These channels are allowed to mention the sponsor's name or brand³³. The 1997 revised Directive allows dedicated teleshopping channels, so French channels could now be received abroad³⁴. It is interesting to note that the CSA complained to the Commission about the ITC's licensing of pan-European dedicated teleshopping channels, but nevertheless licensed such channels on French cable networks. The CSA believed that, notwithstanding its opposition to international teleshopping channels, it is entitled to license channels which are only seen in France, since the TWF Directive does not apply to channels which are only received in one Member State³⁵.

³¹ Article 8(2) to (6), Decree 92-882 of 1 September 1992, modified by Decree 95-77 of 24 January 1995.

³² Article 14(1), (2) and (3), *ibid.*

³³ Article 23(1), *ibid.*

³⁴ Article 19, European Parliament and Council Directive 97/36/EC of 30 June 1997 modifying Council Directive 89/552/EEC, OJ L 202 of 30 July 1997.

³⁵ Article 2(3) Council Directive 89/552/EEC of 3 October 1989; Scorer, J. (1994) "Home Shopping Broadcasting: A storm in a shopping basket? Let the market decide", *Entertainment Law Review*, Vol. 5, Issue 6, November/December, 229.

French commercial broadcasters complain about the strict rules on teleshopping programmes. Especially disturbing is the prohibition on showing the product trademark or provider. It extends to teleshopping the ban on any product presentation in the context of sponsorship in Decree 92-280 of 27 March 1992³⁶. The viewer, advertisers argue, is prevented from vital information on screen, but advertisers accept the rules as being better than nothing³⁷.

The French regulator chose to apply a stricter view on airtime limits for “direct offers to the public”. Apart from teleshopping programmes, other teleshopping-like features and other new forms of commercial communications such as telepromotions, direct response advertising and infomercials do not benefit from the extra five per cent in daily airtime allowance in Article 18 of the 1989 TWF Directive. If broadcast, infomercials would count towards television advertising limits³⁸. Telepromotions in France are considered clandestine advertising, for they are a product promotion outside the framework of a commercial break³⁹.

VII. 3. 2. Germany

The regulation of commercial formats such as direct offers to the public is laid down in the *Rundfunkstaatsvertrag* (RfStV) in its various amended versions⁴⁰. In Germany, direct offers to the public have been identified with teleshopping broadcasts and the RfStV specifically bans these from public broadcasting⁴¹. Forms of advertising, such as direct offers to the public for the sale, purchase or rental of products or for the provision of services, must not exceed one

³⁶ Article 18(III), Decree 92-280 of 27 March 1992 laying down the general principles on advertising and sponsorship, JO 28 March 1992, 4313.

³⁷ Edouard Boccon-Gibod, TF 1, interview in Paris, June 1996.

³⁸ Hélène Saillon, Legal Department, M6, telephone interview, November 1997.

³⁹ Edouard Boccon-Gibod, TF 1, letter of 8 July 1996.

⁴⁰ *Rundfunkstaatsvertrag* of 26 August 1996, in *MediaPerspektiven Dokumentation*, I/96.

⁴¹ Article 18, RfStV, 26 August 1996.

hour a day. Broadcasters shall not act as contracting parties or agents for goods and services⁴².

The RfStV allows *Dauerwerbesendungen*, that is commercial broadcasts of a predominantly advertising nature, where advertising constitutes a substantial part of the broadcast. These long advertisements must be identified as such at the beginning and must remain distinguishable throughout their duration. The definition of *Dauerwerbesendungen* in the RfStV applies when regulating direct offers to the public⁴³. The internal codes of public broadcasters restate the ban on teleshopping, but allow *Dauerwerbesendungen*, provided that they do not include a direct offer to buy or sell products⁴⁴.

At *Länder* level, the *Werberichtlinien* regulate *Dauerwerbesendungen* and direct offers to the public for private broadcasters⁴⁵. *Dauerwerbesendungen* are identified as commercial broadcasts lasting more than ninety seconds when their clear advertising nature plays an informational role. *Dauerwerbesendungen* are possible provided they are distinctively identified on the screen with the word *Werbesendung* or *Dauerwerbesendung*. Spot advertisements inserted within *Dauerwerbesendungen* may not be separated by an advertising logo. *Dauerwerbesendungen* directed at children are not allowed⁴⁶.

In Germany, direct response advertising is subject to the same restrictions as direct offers to the public. Direct response advertising spots lasting more than ninety seconds have to be identified as *Dauerwerbesendungen*. They may be broadcast for no more than a total of one

⁴² Article 45(3), *ibid.*

⁴³ Article 7(4), RfStV, 26 August 1996.

⁴⁴ Rules 3.4 and 4.1, *ARD-Richtlinien für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring*, 28 November 1994; Rules 3.4 and 4, *ZDF-Richtlinien für Werbung und Sponsoring*, 7 October 1994.

⁴⁵ *Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen, (Werberichtlinien)*, 8 November 1994.

hour a day, and have to comply with the general rules on form and content for *Dauerwerbesendungen* in both the *Werberichtlinien* and the RfStV⁴⁷.

Advertising on German television comes under the protection of freedom of broadcasting, but in order to protect the viewers' interests advertising should not influence television programmes. Airtime limits and restrictions can only be challenged when the financial role of advertising is not clear, as in dedicated teleshopping channels. Teleshopping features cannot be considered as a source of income for television, but as a programme with the commercial task of selling an audio-visual catalogue by electronic means⁴⁸. The question for German legislators was to define the communicative role of teleshopping, if any, in order to determine whether dedicated channels would fall under the Media and Public Opinion laws, for the protection of viewers and the separation of advertising from programmes. If such channels were seen as advertising without programming, they could not be categorised as broadcasting⁴⁹.

Another issue in the debate was whether the regulation of teleshopping channels came under *Länder* authority or not. The *Länder* have the authority to regulate cultural matters. If teleshopping channels, by using television as a technical medium, consist of the presentation and trade of products and services, the regulatory responsibility shifts from the cultural to the economic domain, which is a *Bund* responsibility, and therefore, assimilated to telecommunications⁵⁰. Teleshopping channels started to develop in Germany in the 1990's in the context of this undefined regulatory environment, and as a result of it.

⁴⁶ Rule 6, *ibid.*

⁴⁷ MGM MediaGruppe (1995) *Die wichtigsten gesetzlichen Grundlagen für die Werbung im Privaten Fernsehen*, München: Droste Rechtsanwälte, Section IV.

⁴⁸ Degenhart, Ch. (1995) "Rechtliche Aspekte des Teleshopping", *ZUM*, N°6, 353-360.

⁴⁹ Ridder, Ch-M. (1995) "Teleshopping-elektronisches Versandhaus oder Fernsehprogramm", *Media Perspektiven*, September, 420.

Home Offers Television (HOT) started in Autumn 1995 as a joint venture between commercial broadcaster Pro 7 and the catalogue concern Quelle. Initially it was relayed via the Bavarian cable system, but was later authorised for broadcast on the ASTRA satellite for reception throughout Germany. Although there were already teleshopping broadcasts, in the form of infomercial programmes and direct response advertising, HOT was the first all-German, twenty-four hour shopping channel to be licensed in Germany, and was considered to be a mail-order business:

“The shareholders and management of HOT are convinced that teleshopping is by no means a radio transmission, at least not in the way it is actually referred to. It is for this reason that the concessions and legislation applied until now to the television programmes, as well as rules securing the variety of opinions, are no longer applicable to HOT’s transmissions”.⁵¹

RTL plus, the leading private broadcaster, challenged the authorisation of the Bavarian Central Office for New Media (*Bayerische Landeszentrale für Neue Medien*, BLM) for HOT to broadcast via cable. As a result of provisional legal proceedings before the Munich Administrative Court on 15 November 1995, the BLM was provisionally obliged to exclude HOT from the Bavarian cable system. RTL Plus claimed that the authorisation did not comply with airtime limits in the RfStV and that it interfered with the basic economic environment of RTL plus⁵².

The Bavarian Court did not clarify whether or not teleshopping was broadcasting. If teleshopping could not be categorised as broadcasting, the BLM had acted beyond its terms of reference in concluding the contract. But if HOT was broadcasting, it came under the

⁵⁰ Degenhart, Ch. (1995) op. cit., 358.

⁵¹ “HOT, the mail-order business firm of the future”, statement of Dr. Georg Kofler, Managing Director of Pro 7 Television GmbH and Chairman of the HOT GmbH und co. KG Committee, on the occasion of a press conference on 26 April 1995 in Munich, mimeo.

⁵² Ruling by the Munich Administrative Court on 15 November 1995, M3E96, 4829, in “Germany: Discussion on the authorisation of the first German teleshopping channel HOT”, *IRIS*, January 1996, Vol. II, 5.

scope of the RfStV, according to which advertising may only be used as a source of finance, and broadcasters shall not act as contracting parties in goods or services⁵³.

Nevertheless, on 17 December 1995, the BLM Supervisory Council agreed to the nationwide broadcasting of HOT on satellite, notwithstanding the opposition of the Directors' Conference of the *Landesmedienanstalten*, now *Arbeitsgemeinschaft der Landesmedienanstalten*. According to BLM, pure teleshopping channels were not covered by the definition of broadcasting in the RfStV, nor was a decision at the Directors Conference level necessary. The authorisation was for a pilot test, with time and geographical limits, and for that, the Bavarian Media Law offered sufficient scope. RTL tried to stop the programme from being shown on cable in Bavaria by seeking a provisional injunction from the Bavarian Administrative Court, but was unsuccessful in the initial proceedings. The decision was reversed on appeal to a higher Court. Dissemination of the teleshopping channel was prohibited by the Bavarian Constitutional Court in 1995. HOT brought a constitutional appeal against this decision and the Bavarian Constitutional Court granted a provisional suspension of the ban until the appeal had been decided. RTL could further appeal to the German Federal Constitutional Court, but since there were expectations that the German Law would change to liberalise teleshopping channels, the action did not make much sense⁵⁴. RTL argued that the Bavarian media authority was giving HOT unfair competitive advantage by allowing it to be transmitted before the national law was changed. HOT was also given a licence by the UK regulatory office ITC⁵⁵. On the other hand, QVC, a UK licensed teleshopping channel had also applied for a licence before the Nordrhein-Westfalen authorities⁵⁶.

⁵³ Articles 43 and 45(3), RfStV, 26 August 1996.

⁵⁴ Steffie Bleil, Pro 7, interview in London, November 1996.

⁵⁵ "RTL TV abandons bid to stop HOT broadcasting", *New Media Markets*, 11 January 1996, 8.

⁵⁶ "QVC to fall foul of new German carriage law", *New Media Markets*, 25 January 1996, 14.

At the time of writing, the dispute has lost part of its rationale. The revised TWF Directive adopted in June 1997 allows dedicated teleshopping channels, and its transposition would effectively allow HOT to exist⁵⁷.

VII. 3. 3. Italy

The regulation of direct offers to the public in Italy has developed within the framework of sponsorship practices and regulation. Law 223 of 6 August 1990 or the Mammì Law, which included sponsorship credits in the calculation of airtime limits, required the Ministry of Post and Telecommunications to develop the rules on sponsorship⁵⁸.

Decree-Law 408 of 19 October 1992 established some rules for direct offers to the public which had not been contemplated in the Mammì Law⁵⁹. It increased the daily airtime limit by five per cent for private broadcasters to include forms of advertising such as direct offers to the public. Teleshopping finally acquired a legal status and was able to profit from a further five per cent of the daily advertising time quota. The issue of the commercial nature of telepromotions still remained for national advertising-funded television channels, since they counted towards spot airtime allowances. Because of their long duration, broadcasters requested that telepromotions be excluded from the airtime quota for spot advertising, starting a heated debate.

In 1993, the Commission declared that telepromotions were a legitimate form of advertising, and not contrary to the 1989 TWF Directive. Nevertheless, it considered this to be a national

⁵⁷ Article 19, European Parliament and Council Directive 97/36/EC of 30 June 1997 modifying Council Directive 89/552/EEC, OJ L 202 of 30 July 1997.

⁵⁸ Article 8(15), Law 223 of 6 August 1990 on the regulation of the public and private television systems, GU 85 of 9 August 1990.

⁵⁹ Decree-Law 408 of 19 October 1992 co-ordinated with Conversion Law 483 of 17 December 1992, establishing urgent provisions in television advertising, GU of 18 December 1992.

issue, an internal debate for the purposes of applying stricter daily and hourly airtime restrictions than those in the 1989 TWF Directive⁶⁰. The practical issue at stake was whether the extra five per cent allowance for forms of advertising “such as direct offers to the public” could be used to include telepromotions. Such an interpretation of the European norm would be less punishing on telepromotions than the Italian rules assimilating them to spot advertising.

Ministerial Decree 581 of 9 December 1993 was issued to comply with the TWF Directive. It regulated direct offers to the public in Article 10⁶¹. The minimum duration of such broadcasts is set at three minutes, and teleshopping featuring products banned from advertising on television is prohibited. Other provisions in Article 10 are the requirement to identify teleshopping broadcasts as such, and to differentiate them from the editorial content of programmes. Direct offers to the public have to be defined by a specific opening and closing sign in order to warn the viewers of the particular nature of the broadcast. Finally, teleshopping broadcasts may include advertising breaks provided they are clearly different from teleshopping. The description of products on offer must be accurate in their quantitative and qualitative characteristics to avoid any misunderstanding on the products’ features, size, weight and quality. The offer has to be clear, accurate and must include information on price, guarantees and form of delivery⁶². Unlike direct offers to the public, telepromotions still count towards the spot advertising limit of fifteen per cent of daily transmission time. This measure effectively bans telepromotions from television due to their long duration. Article 13 also bans telepromotions from news and programmes with an economic, financial or political content⁶³.

⁶⁰ Commission of the European Communities, *Telepromotions and European Directive*, Press Release IP(93) 396, Brussels, 24 May 1993.

⁶¹ Ministerial Decree 581 of 9 December 1993 on the regulation of sponsorship of television and radio programmes and of direct offers to the public, GU 8 of 12 January 1994.

⁶² Article 10(2), (3), (4), (5) and (6), *ibid.*

⁶³ Articles 12 and 13, *ibid.*

As mentioned in previous chapters, Ministerial Decree 581/1993 was contested by *Reti Televisive Italiane* (RTI), the leading private television channel, and Publitalia'80, their sales house, which sought its annulment before the *Tribunale Amministrativo Regionale del Lazio* (TAR). In relation to telepromotions, TAR asked the European Court of Justice to consider the interpretation of the provisions in Article 18(1) on airtime limits⁶⁴. The contestants argued that Italian law should have considered telepromotions as direct offers to the public so that they could also benefit from the additional five per cent of airtime allowed in Article 18(1). They also alleged that the Italian transposition of the European norm was illegal. The legislator had only permitted those amendments to Ministerial Decree 439/1991 that were necessary to comply with the TWF Directive. In RTI's view, it was unnecessary to require that telepromotions should be subject to spot advertising restrictions⁶⁵.

The ECJ finally ruled that telepromotions were a form of publicity that lasts longer than spot advertisements, therefore they could benefit from the provisions of the increased transmission time, but the 1989 TWF Directive does not place any obligation on the Member States to increase the daily advertising transmission time. Even if the TWF Directive itself did not require implementation of Article 18 in the restrictive manner of the Italian legislation, it none the less did not prohibit such implementation. Member States are allowed to set stricter rules for the types of advertising which may benefit from increased transmission time⁶⁶.

⁶⁴ ECJ, Judgement of 12 December 1996 in Joined cases C-320, 328, 329, 337, 338 and 339/94 *RTI v Ministero*, 1996 ECR, I-6471.

⁶⁵ Article 3(2), Decree-Law 408 of 19 October 1992 empowered the Minister of Post and Telecommunications to amend "*le necessarie modificazioni*" to Ministerial Decree 439/1991.

⁶⁶ ECJ, Judgement in Joined Cases C-320, 328, 329, 337, 338, 339/94, *RTI v Ministero*, 1996 ECR, I-6471.

In practice, telepromotions on Italian television were converted into telesales or shorter versions of teleshopping, by adding a telephone number at the end of the presentation which the viewer could ring to get further information about the product and eventually to buy it.

For local television, telepromotions remain outside the spot advertising airtime limits, and the total daily quota was set at thirty five per cent⁶⁷. Although not under the scope of the TWF Directive, local television is widely spread in Italy, and this particular treatment is considered by national broadcasters to create a competitive disadvantage

VII. 3. 4. Spain

The transposition of the 1989 Directive into Spanish legislation occurred late and after the required deadlines. In July 1994, Law 25/1994 incorporated the provisions in the Directive and those from previous laws into a single legal text⁶⁸. Private television was previously regulated by the 1988 Law of Private Television, which set a maximum of ten per cent of the average daily transmission time for television advertising, with a maximum of ten minutes per hour⁶⁹.

Direct offers to the public in Spain are commonly assumed to be teleshopping under several forms: teleshopping spots, teleshopping programmes, infomercials, teleshopping “on-production”, “advertising microspaces” or longer teleshopping spots. The definition of television advertising in the Spanish Law does not specifically exclude direct offers to the public, as does the definition of the 1989 TWF Directive⁷⁰.

⁶⁷ Article 9(1), Decree-Law 323 of 27 August 1993 co-ordinated with Conversion Law 422 of 27 October 1993 on urgent provisions in the field of radio and television, GU 253 of 27 October 1993.

⁶⁸ Law 25/1994 of 12 July 1994 of Transposition of Council Directive 89/552/EEC, BOE 166 of 13 July 1994, 22342.

⁶⁹ Law 10/1988 of 3 May 1988 of Private Television, BOE 108 of 5 May 1988.

⁷⁰ Article 1(b), Law 25/1994.

The maximum daily allowance for spot advertising may be increased by five per cent for direct offers to the public up to a maximum of one hour per day⁷¹. The limits apply both to any teleshopping broadcast within programmes, or “internal direct offers”, and teleshopping spots. The latter are assimilated with spot advertising for the purposes of the spot hourly limit set at twelve minutes per hour⁷². For the purposes of the daily maximum, teleshopping spots are considered direct offers to the public, and therefore benefit from the extra five per cent allowed in this case.

In Spain, telepromotions are promotional messages within programmes. They consist of a verbal presentation during the programme of the advertiser’s products or services with a sales purpose. They are different from spot advertising since telepromotions take part in the flow of the programme, and they are different from teleshopping because the telephone number included is only for informational purposes. The viewer should be able to identify them clearly. Normally a caption with the word “telepromotion” or “advertising promotion” is used at the beginning or throughout the promotion to comply with the advertising identification rule⁷³.

VII. 3. 5. UK

UK regulation on direct offers to the public is divided between two ITC Codes: the ITC Code of Advertising Standards and Practices (CASP) and the ITC Rules on Advertisement Breaks (RAB). The ITC also lays down provisions for commercial broadcasts related to direct marketing, such as direct response advertising or postal orders.

⁷¹ Article 14(1) and (3), *ibid.*

⁷² Article 14(2), *ibid.*

Rule 37 of the CASP regulates home shopping. Features of programme length in which goods and services are described or demonstrated and offered for sale, purchase or hire to viewers are regarded by the ITC as advertisements and must comply with all requirements of the CASP.

Further rules on home shopping features are laid down in the RAB. Section 8 regulates the frequency and type of breaks for home shopping features. Up to five per cent of daily transmission time above the fifteen per cent allowed for spot advertising, may be dedicated to home shopping features in channels other than ITV, Channel 4 and Channel 5. In no circumstances may home shopping features exceed one hour per day. Extended advertising features involving demonstrations and direct offers to the public are treated as “long advertisements,” but are excluded from advertising minutage on services other than ITV, Channel 4 and Channel 5⁷⁴. The ITC has recently allowed the licensees for Channels 3, 4, and 5 to aggregate, without the prior permission of the ITC, their spot advertising allowance between the hours of midnight and 6.00 a.m. in order to place long advertisements, including home shopping features. The slot should be advertised in the published programme listings⁷⁵.

Satellite and cable channels carrying both programmes and advertising may already broadcast up to one hour per day of home shopping, which is the maximum allowed by the 1989 TWF Directive.

During the time between the publication of the RAB in January 1991 and the TWF Directive coming into force in October 1991 dedicated teleshopping channels were licensed in the UK. The ITC and the Home Office, at that time the UK Government Department responsible for

⁷³ Article 12(1) requires the separation of advertising from programmes.

⁷⁴ Rule 8.1, ITC Rules on Advertising Breaks, January 1991.

⁷⁵ Rule 7.1.5(A) amended, ITC Rules on Advertising Breaks, in ITC News Release 53/96, “ITC amends rules on long advertisements”, 17 July 1996.

broadcasting, decided that the TWF Directive did not restrict specialised home shopping channels to broadcasting for a maximum of one hour per day⁷⁶. The ITC's position was that teleshopping channels were more of "a shop than a proper broadcaster, not competing for audience, nor competing for advertising revenue because the products do not sell in regular shops"⁷⁷. It was possible to argue that the TWF Directive did not prevent the UK from allowing dedicated teleshopping channels and the ITC saw no inequity in allowing them.

It was not clear whether the TWF Directive applied to channels selling products for a third party in exchange for remuneration, or only to channels selling their own products⁷⁸. Teleshopping programming on dedicated teleshopping channels was only considered advertising if the products offered for sale were licensed by a third party. Teleshopping channels owned the products they were selling. The application of Section 8 to dedicated channels was thus left subject to changes in view of future changes in the TWF Directive⁷⁹.

The ITC Codes also provide for other forms of direct offers to the public such as Direct Response Advertising. These rules are also to be reviewed in the light of TWF Directive on Distance Selling⁸⁰. This form of publicity is unacceptable unless arrangements are made for callers to be informed by the broadcaster of the full name and address of the advertiser. The ITC requires transparency in the transaction: samples of products must be available for inspection, the advertiser must be able to meet any product demand created by the advertisement, and enquiries must be handled by a responsible person available on the premises during normal hours. The advertiser must be able to fulfil orders within twenty eight days from receipt except in exceptional circumstances. Adequate arrangements must be

⁷⁶ Scorer, J. (1994) *op. cit.*, 227.

⁷⁷ Frank Willis, ITC, interview in London, November 1995.

⁷⁸ Ridder, Ch.-M. (1995) *op. cit.*, 414.

⁷⁹ Rule 8.4, ITC Rules on Advertising Breaks, January 1991.

⁸⁰ European Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144 of 4 June 1997, 19.

made to protect the money and for the prompt and full refund to buyers who can show justifiable cause for dissatisfaction with purchases or with delay in delivery. Advertisers who offer goods by mail or other forms have to be prepared to demonstrate the goods advertised to the broadcasters for the purposes of assessing advertising claims. The callers have to know when the advertisers intend to call on persons responding to the advertisement, and in such case, advertisers must give adequate assurances that representatives will demonstrate, and make available, the products advertised. Representatives which offer any cheaper product, or delay delivery, or who render the purchase difficult are considered to be misleading⁸¹.

Advertisements which invite children to purchase products by phone or mail are also prohibited, a rule that also affects teleshopping⁸².

In July 1997 changes were made to ITC Rules on Advertising Breaks following the adoption of the revised Directive⁸³. The changes will enable cable, satellite and new channels to carry additional teleshopping advertising⁸⁴.

The new amendments affect Section 1 and Section 8 of the Rules on Advertising Breaks. Rule 1.1(B) (b) specifies that the further five per cent daily allowance for airtime purposes should only be devoted to teleshopping spots. Both dedicated teleshopping channels, and teleshopping windows on channels not exclusively devoted to teleshopping, are permitted. Rule 1.2 sets the total maximum of twelve minutes an hour for advertising spots, including teleshopping spots.

⁸¹ Rule 36, ITC Code of Advertising Standards and Practice, Summer 1997.

⁸² Rule 8, Appendix 1, "Advertising and Children", ITC Code of Advertising Standards and Practice, Summer 1997.

⁸³ European Parliament and Council Directive 97/36/EC of 30 June 1997 modifying Directive 89/552/EEC, OJ L 202 of 30 July 1997.

⁸⁴ ITC News Release 67/97, "Teleshopping windows and self-promotional channels", 31 July 1997.

Rule 8.1 defines teleshopping as a form of advertising involving the broadcast of direct offers to the public with a view to the supply of goods or services, including immovable property, or rights and obligations, in return for payment. Rule 8.2 states that teleshopping spots, windows or channels devoted to teleshopping are covered by the CASP.

For channels other than ITV, Channel 4 and Channel 5 an extra five per cent above the spot advertising maximum of fifteen per cent of transmission time may be devoted to teleshopping spots. This five per cent may be increased by any balance of the fifteen per cent of transmission time not devoted to spot advertising. Teleshopping windows may be broadcast on channels not exclusively devoted to teleshopping subject to certain limits: a teleshopping window shall last for at least fifteen minutes; there shall be no more than eight teleshopping windows per day; the overall duration of teleshopping windows shall not exceed three hours per day; and teleshopping windows shall be clearly identified by both optical and acoustic means at both the beginning and end of each window⁸⁵. Finally, the ban on interrupting teleshopping channels with advertising is lifted by Rule 8.3.3. Channels devoted exclusively to teleshopping may now carry other forms of advertising, subject to the above mentioned rules. In this case, the maximum of twelve minutes per clock hour of spots does not apply⁸⁶.

⁸⁵ Rules 8.3.1 and 8.3.2, ITC Rules on Advertising Breaks, amended on 31 July 1997

⁸⁶ Rule 8.3.3(a) and (b), *ibid.*

VII. 4. Conclusions

The regulation of direct offers to the public developed according to the importance of these forms of commercial communication in individual Member States. Since the 1989 Directive had not provided a proper definition, but only mentioned them for the purposes of airtime restrictions, the concept varies among these Member States. The level of detail in the regulation also varies enormously. In Spain, for example, the legislator simply opted to translate the words in the European Directive, whereas in the UK, the ITC chose to define several types of direct offer to the public. As a result, in the UK, there are guidelines on infomercials, on home shopping features, on direct response advertising, and even on the dedicated teleshopping channels which were licensed. One of the reasons for these differences in the detail of regulation may lie in the level of market development. Teleshopping features were present in cable channels in the UK, whereas in Spain, teleshopping started in the early 1990's. Another factor in understanding these differences may lie in the principles underlying a single Member States' systems of media and advertising regulation.

France and Germany established a ban on teleshopping features in public broadcasting. The UK had a similar ban for terrestrial channels until 1997, when it opened its rules in view of the new 1997 TWF Directive's provisions. Still, teleshopping is restricted to the night hours on terrestrial channels. France applies a ban on the display of the products' trademark, which is considered as very strict by the commercial sector.

Both France and the UK apply different rules for cable channels, establishing a less strict set of rules. In France, products can be named and their trademarks displayed in dedicated teleshopping channels. The issue of dedicated teleshopping channels has provoked pan-

European issues. France did not allow foreign dedicated teleshopping channels, whereas it did allow French teleshopping channels, on the basis that because local, they did not fall under the provisions of the TWF Directive. In Germany, dedicated teleshopping channels started broadcasting because it was not clear whether they fall under the *Bund* or *Land* jurisdiction.

In both Germany and the UK, teleshopping broadcasts are considered to be long advertisements for the purposes of airtime control. General rules governing the content and scheduling of advertising may apply in these Member States. Italian television fared worst in the debate on the nature of telepromotions, because it had to regulate them as teleshopping broadcasts, not delivering quite the same advertising function. Italian television had to realign its sales offers to advertisers, by managing its traditional advertisement airtime stocks more efficiently. In Italy the debate resulted in telepromotions being converted to a kind of teleshopping features, in order to benefit from the extra allowance in the TWF Directive of five per cent dedicated to direct offers to the public.

In any event, there was a lack of precision at the European level. In 1989 teleshopping and other forms of advertising were not an important source of income for advertising-funded television in Europe, and had only been contemplated marginally in the 1989 TWF Directive. The turmoil caused by the telepromotions case in Italy, extended to Spain and Germany where these advertising practices were well established, and has probably affected the way legislators view new forms of commercial communication. The key at the commercial level, is to manage commercial airtime allowances. There are no stocks of television commercial advertising time. That which has not been sold today cannot be made good tomorrow. Audiences and selling potential are lost. This underlines the battle to interpret Article 18(1) and (3) setting the limits for direct offers to the public. Some forms of commercial

communication last longer than traditional advertisements, some have the potential to become blurred with programmes, some clearly embody a different concept of television content.

Infomercials and other forms of teleshopping are still not categorised and develop under the blanket of direct offers to the public. In France, for example, infomercials are assimilated with television advertising, and the extra five per cent airtime allowance in the TWF Directive is not being used. The regulator chose a stricter set of airtime limits. The ITC in the UK distinguished between “home shopping” and “direct response advertising”, comparable to a distant selling agreement. German *Direct Response Werbung*, use the format of a spot advertisement and they display an offer to purchase a product by directly placing an order using a phone number superimposed in the spot. In Spain and Italy this form is not acceptable. The general practice is to assimilate them to spot advertising for the purposes of airtime quotas.

SECTION III

CHAPTER VIII

FINAL CONCLUSIONS

VIII. 1. The thesis

The thesis began with the perception that there were a number of problems in the creation of a level playing field for television advertising and sponsorship, arising from the divergent interpretations of the provisions in the 1989 TWF Directive. In order to be enforced, the TWF Directive had to be transposed into the domestic legal systems by national legislatures of the Member States, and then enforced by the relevant regulatory bodies. The TWF Directive contained an internal contradiction: its aim was to foster the free flow of television services and to co-ordinate national regulations. However, the particular ways in which the TWF Directive has been implemented at the national level have prevented it from being completely successful in achieving its objectives. The reasons for the divergences are found in the different national regulatory traditions across Member States. The regulatory authorities, the extent of their powers and their degree of control vary enormously between Member States. The latter also have different levels of advertising expenditure and television market structures in the environments in which the implementations have taken place.

The purpose of the thesis was thus to identify and clarify the problems in interpretation of the provisions for television advertising and sponsorship in the TWF Directive. It has investigated the issues raised by regulators, commercial media and advertising interests operating within different market structures and under different legal systems, at both

national and European levels. The comparative analysis of the five countries studied shows that there are indeed divergent interpretations of aspects of television advertising, sponsorship, and new forms of advertising that were in their infancy when the first TWF Directive was agreed. These differences gave rise to two types of problem in establishing a Single European Market.

The first problems identified are those that affect the overall workability of the TWF Directive; others relate specifically to the permitted relationships between the advertiser and the broadcaster, that is, television advertising, sponsorship, surreptitious advertising and direct offers to the public. Within these categories, there are issues affecting both advertising content and the quantity and mode of deploying advertising on television.

VIII. 2. Framework obstacles: advertising and regulatory differences at both national and European levels

One of the objectives of the TWF Directive was to foster a European television industry that could compete with other television industries. To do so, the European Union had to accept advertising and sponsorship as the main sources of income. Although traditional spot advertising is still the primary form of television revenue from advertising sources, today it is supplemented by sponsorship, teleshopping and other forms of advertising, used by advertisers to reach increasingly fragmented audiences. New forms of commercial communication, such as infomercials or direct response advertising, have grown since the adoption and the implementation of the TWF Directive. When it was originally implemented, the only other form of advertising that was present in European broadcasting was teleshopping. A sort of catalogue sale on television, teleshopping offered small advertisers the advantage of lower production costs than other forms of promotion and so attracted new

advertisers to the medium. Commercial television operators also welcomed teleshopping as a new way to maximise their revenue from the sale of their advertising airtime. As time went by, these new forms of advertising were further developed and used by both advertisers and broadcasters. Although not defined in the 1989 text, they have been regulated on a case-by-case basis by individual Member States.

Because of difficulties in reaching and measuring audiences, pan-European advertisers still buy most of their advertising campaigns on national channels. The country by country analysis shows that airtime is mainly sold at the national level, where there are differences between Member States in the way it is traded, notably in discounting practices. Germany, for example, has always been reluctant to use heavy discounts for selling airtime, although private broadcasters are slowly introducing more flexible ways of selling. The other four countries regularly offer discounts. Another outcome of the increased volume of advertising has been clutter, and as a result, both advertisers and broadcasters have tried to diversify into alternative forms of commercial communications, especially sponsorship, product presentations and direct offers to the public.

There are also differences in the national regulatory environments. These can be found in the traditional mode of specific media regulation, whether by law, regulation or administrative action, which can affect the level of regulatory detail in implementing the TWF Directive's provisions. Therefore, each of the governments in the five countries studied has solved the tensions between developing a national television sector and its commitment to a Single European Market, in its own particular way. The legal levels at which the TWF Directive is implemented also affect the ways in which Member States deal with national political, economic and cultural policy objectives.

In each of the five countries, problems have arisen in the relationship between the particular regulatory authority and broadcasters, both public and private. In France, for example, there are tensions between the CSA and broadcasters as to the extent of the CSA's regulatory powers. Since 1992, public broadcasters have been subject to CSA control which has caused further tensions between them. Before the 1989 TWF Directive, France already had in place some regulatory texts in their approach to advertising, as there was a strong political commitment the protection of audio-visual works from interruptions by advertising. As the French regulatory regime also distinguishes between public and private terrestrial broadcasters, as well as between private cable and terrestrial channels, France effectively has established a three-tier regulatory system based on decrees and CSA decisions.

In Germany, tensions have arisen from the different regulatory systems laid down for public and private broadcasters. In the *Rundfunkstaatsvertrag* (RfStV), or Inter-Land agreement, Germany adopted different provisions for public and private broadcasters. Public broadcasters are subject to the provisions of the RfStV, whereas private broadcasters are also subject to a further set of guidelines on television advertising and sponsorship, the *Werberichtlinien*, agreed by the *Landesmedienanstalten*. This dual system creates a double set of detailed regulations for broadcasters. Sponsorship credits appearing at centre breaks have been a point of friction. Public broadcasters started to use bumper credits, when the private channels were specifically banned from using them by the *Werberichtlinien*. Private broadcasters considered they were in a disadvantageous situation. Another element in the dispute was the weak financial situation in which German public broadcasters found themselves in the 1990's. The difference will be resolved when the *Landesmedienanstalten* amend that particular rule in Summer 1998, so that private broadcasters can show bumper credits at centre breaks.

In Italy, the 1989 TWF Directive was implemented by a series of laws, decrees-laws and ministerial decrees. The country also has a strong tradition of self-regulation which guided commercially-funded broadcasters in a hostile legal environment. During a four-year period Italy tried to implement the provisions for sponsorship and direct offers to the public by a complicated exchange of decrees. As the thesis shows, the regulatory process has shaped the rules for certain forms of advertising that represented a substantial source of revenue for both public and private broadcasters. These forms of advertising were commonly practised in broadcasting but were not defined in the TWF Directive, however. In Italy, the tension between regulators and commercial broadcasters was specifically centred in the high commercial value these new forms of advertising represented for broadcasters. The latter turned to the European institutions in order to legitimise the practice and reach a satisfactory degree of national regulation.

In Spain, the legislature chose to implement the TWF Directive in a single legal text covering both public and private channels. Because of its late implementation into the Spanish legal system, issues in the TWF Directive that had emerged in other Member States were laid down more clearly in the Spanish text, notably the hourly allowance for self-promotional trailers in the Law of Transposition, which was designed to limit the overall length of programme breaks.

In the UK, the 1990 Broadcasting Act empowered the ITC to lay down Codes of Practice, which implemented the 1989 TWF Directive. The UK followed a long-standing tradition of statutory regulation and the level of detail is considerably more specific than in the other four countries studied.

The differences in regulatory systems, advertising markets and television structures make the co-ordination of provisions at the European level difficult. There are also different degrees of enforcement at national level. The regulation of television advertising is nationally based, and because of the difficulties in applying the same level of detail in rules and guidelines to all Member States, there is a tendency for it to remain so. The aim of European Union policy was to develop the free circulation of services between Member States. In that respect, divergent national regulations are still considered to hamper such movement. The 1989 TWF Directive, however, has allowed transfrontier television to develop, and has opened opportunities for transfrontier advertising. As the research shows, it is precisely in the practice of developing a Single Market in television advertising that the inner contradictions and ambiguities of the 1989 TWF Directive have become obvious.

The 1989 TWF Directive was based on the principle of minimum standards and mutual recognition. In order to apply to television broadcasting the freedom to provide services within the Single Market, it requires that a Member State be responsible for the effective application of its own law to broadcasters under its jurisdiction. It also states that no Member State can restrict, for reasons which fall within the fields co-ordinated by the TWF Directive, the reception or retransmission on its territory of television broadcasts including advertisements that comply with another Member State's regulation. Thus, provided that the advertisements comply with the rules of the country holding jurisdiction, mutual recognition has to be conceded. However, as studied in Chapter III, the concept of jurisdiction has been difficult to apply. The difficulty lay in establishing common criteria for bringing television services under a particular legal system. The issue affected the powers of the receiving Member State to accept, control or regulate advertising transmitted from another Member State.

There was, however, a lack of clear criteria by which to determine when a broadcaster came under the jurisdiction of a given Member State. In the absence of a precise criterion, the European Commission always favoured the place of establishment as the correct one and most Member States understood the place of establishment as the key requisite. But the UK took the Council of Europe's view, that is, the place from where the television service was up-linked, even though Article 27 of the CoE Convention also gives priority to European Union regulations. The European Court of Justice (ECJ) has decided the issue, and in general terms it coincides with the European Commission's view. The ECJ confirmed in *the Commission v the UK* and in *the Commission v Belgium* that the place of establishment is the right criterion by which to establish jurisdiction. The position has been specifically adopted in the new 1997 TWF Directive, where Article 2 clearly states the concept of jurisdiction and the criteria by which to determine how a broadcaster is deemed to be established in a Member State.

Advertising is recognised by the European Court of Human Rights as covered by Article 10 of the European Convention on Human Rights (ECHR). Potential reasons for stricter rules could only be based on those permitted by Article 10(2) of the ECHR, in particular those for the protection of health or morals, or for the protection of the reputation or rights of others. Problems in the workability of the TWF Directive arise in connection to advertising and the protection of culture, public health and the consumer at the national level, as interpretations of these concepts vary between countries. The TWF Directive prevented a Member State from introducing measures against a television advertisement broadcast by an advertiser from another Member State unless it breached Article 22 on the protection of minors. In the *De Agostini* case, the ECJ ruled that a Member State could only take measures against an advertisement broadcast from another Member State on the grounds of misleading

advertising, provided that these measures did not prevent broadcasts of transfrontier programmes.

The ruling will have an impact on the future of transfrontier advertising because it forces advertisers to comply with both the rules of the country retaining jurisdiction and with those on misleading advertising in the country receiving the advertisement. Countries may also have different degrees of rule enforcement. The judgement will therefore increase the difficulties experienced by pan-European advertising campaigns and reinforce the trend towards national regulations on advertising content. The ECJ established the limits of the TWF Directive, because other legislative texts, such as the Directive on misleading advertising which was recently amended to include comparative advertising, are not based on the principle of country of origin.

The research also shows that there is a tension between the CoE Convention on Transfrontier Television and the TWF Directive. Under Article 27, the CoE Convention gives precedence to Community Law, therefore Member States which have ratified the CoE Convention can only apply the rules of the CoE Convention in those areas where there is no Community rule. In 1997, among the five countries studied in this thesis, only Spain had not ratified the CoE Convention. Italy and the UK ratified it in 1991 and 1992 respectively, while France and Germany did not ratify the CoE Convention until 1994. The UK and France, for example, frequently used the wording of the CoE Convention in their regulatory instruments in preference to that in the TWF Directive, for example, the jurisdictional criterion of the CoE Convention in the UK, or the definition of surreptitious advertising in France.

A second example of this tension is the definition of television advertising. The CoE Convention's definition of advertising must fulfil two requirements, that of promotion and that of being broadcast in exchange for remuneration or similar consideration. Under these requirements, forms of advertising such as teleshopping and self-promotion are included in the definition. On the other hand, the 1989 TWF Directive specifically excluded direct offers to the public and did not refer to self-promotion in its definition of television advertising. The German *Rundfunkstaatsvertrag* does not provide a definition of television advertising as such. Only the *Werberichtlinien*, which apply to private broadcasters, qualify advertising as "economic advertising", thus excluding social advertising and public announcements. France's definition, in Decree 92-280 of 27 March 1992, covers all commercial messages broadcast in return for payment or similar consideration. It specifically excludes direct offers to the public but nothing is said about self-promotion. Spain chose to translate the French definition, but it specifically excluded self-promotion. The ITC Code of Advertising Standards and Practice in the UK applies to all publicity, even self-promotion, regardless of the mode of payment. It could be argued that, although the UK has not a proper definition for television advertising, the ITC Codes apply to a concept that approaches more closely the CoE Convention's definition than that adopted in Spain, for example. The definition in the 1997 TWF Directive excludes teleshopping but includes self-promotion broadcasts, except for the purposes of airtime limits. On the other hand, teleshopping is now defined separately.

Another example of the tension between the CoE Convention and the TWF Directive is the choices made by Member States to define what programme length must be used in the determining airtime allowances. The CoE Convention only refers to the "duration" of a programme, whereas the 1989 TWF Directive qualified duration as "programmed" time, as a result of the wrong translation from the original in French "*durée programmée*". Therefore, it is not clear whether advertising time should be taken into account when calculating a

programme's duration for the purposes of airtime allowances. If advertising time is included, programmed duration is longer, and the broadcaster is able to insert more breaks. The wording of the CoE Convention, because it is a text adopted by consensus, is necessarily more ambiguous, so that the maximum number of countries interested could eventually sign it. Germany opted for the CoE Convention wording "duration" and has had trouble in defining what the real practice for broadcasters should be. Public service channels use the "net" option, that is, not to include advertising breaks in their calculations, but private broadcasters have been using the "gross" version. The new 1997 TWF Directive refers to programme "scheduled duration", that is, including advertising airtime. The European Union interpretation allows more advertising breaks to be inserted within certain programmes, as explained in Chapter IV.

A fourth example is the definition of surreptitious advertising adopted by individual Member States. The CoE Convention banned all presentations of products or services in programmes for advertising purposes. The 1989 TWF Directive presumed intentionality in the presentation of products or services only if presented in return for payment or similar consideration. France has adopted the first view, which is wider in scope. Germany has chosen the definition in the TWF Directive involving the presence of payment, and so does Spain. However, Spain excludes from surreptitious advertising those product presentations that are not sporadic or occasional, and those displayed at outdoors events organised by third parties. Italy and the UK do not have a definition. However, the latter includes one definition of product placement which is similar to that in the TWF Directive for surreptitious advertising.

These examples illustrate the tension between the two European texts. They display the internal tensions between the European Union and the Council of Europe as institutions empowered to regulate the European television scene. The tension lies between the principle of freedom of expression embodied in the CoE Convention and the intention to foster the free flow of goods and services for the completion of a Single Market, of which the TWF Directive is an instrument. In their choices of implementation, Member States also indicate, perhaps unwittingly, their commitment or reluctance to reject one principle by accepting the other.

VIII. 3. Conclusions arising from the comparison of national implementations

Implementation of the TWF Directive is the responsibility of the corresponding national authorities in charge of audio-visual policy. As the research shows, some provisions are interpreted in texts cutting across other policy domains such as that of the audio-visual, but also the protection of consumers and safeguard of public health. In some cases, self-regulatory authorities have played an interpretative role. Within this framework, the comparative analysis leads us through the detail and points at issue in the European text.

VIII. 3. 1. Television advertising

In the 1989 TWF Directive, news and current affairs programmes could not be interrupted by advertising breaks if their programmed duration was less than thirty minutes. All five countries studied have transposed the ban. However, with the exception of France, news is considered as “hard news”, and current affairs programmes are understood to be programmes containing a political information and only the UK provides a clear definition of what current affairs programmes are.

On the content of advertisements, tobacco products were effectively banned in the 1989 TWF Directive. Advertisements for medicines on prescription are also banned from television. Alcoholic drinks can be advertised on television according to national guidelines. The details of the latter differ from one country to another. The main restriction is that of limiting the alcoholic content of beverages that can be advertised on television. France has a total ban on these products. Spain bans drinks of more than twenty degrees of alcoholic content, whereas Germany, Italy and the UK do not. However, Italy bans manufacturers of alcoholic beverages of high alcohol content from sponsorship.

Broadcasts of sport events are traditionally attractive programmes for manufacturers of alcoholic drinks. But on the other hand, guidelines for advertising alcoholic drinks vary between Member States. Therefore, these broadcasts are prime examples of the transfrontier difficulties in advertising content the 1989 TWF Directive has been unable to overcome. For example, in the case of a sports event broadcast from the UK, where alcoholic drinks can be advertised in compliance with UK rules, a total ban on advertising alcoholic drinks, such as the one imposed in France, directly affects a French broadcaster wishing to carry the event or a French cable company that wants to relay a broadcast from a foreign station, although it cannot affect the reception of DTH systems. Indirectly, the regulation in a receiving State can affect the organisation of the event itself. There is a potential loss of revenue for the organiser of the event both from the loss of broadcasting rights, and from the smaller audience reached. French regulators are free to impose stricter rules on their own broadcasters and cable companies, as provided in the TWF Directive, but nevertheless this offers a practical example of the complexity in the implementation of the TWF Directive.

Provisions on the number and frequency of commercial breaks also vary between the five countries. One significant difference lies in the treatment of films and television movies. France, as noted before, was committed to the protection of audio-visual works and banned public broadcasters from inserting advertising, except on certain occasions determined by the CSA. Private broadcasters are restricted to only one interruption. There are also limits on the duration of centre breaks within films and audio-visual works. France is the only country of the five studied that only allows a single break. Germany, Italy and the UK have adopted the regime in the TWF Directive: one commercial interruption for each period of forty five minutes in films and television movies. Spain has excluded television movies from the rule, effectively distancing itself from the wording in the TWF Directive. Both the UK and France also restrict the duration of centre breaks.

Other programmes can be interrupted every twenty minutes, that is, a period of twenty minutes time has to elapse between commercial breaks. Because nothing is said about the time that must elapse before the first interruption occurs, broadcasters have put the provision into practice differently. Again, the new 1997 TWF Directive refers to a period of twenty minutes time that must elapse between breaks within the programme. It is therefore possible that the commercial break at the beginning of the programme and the first break within the programme could occur at less than twenty minutes apart.

Another issue is the possibility of inserting advertising within programmes with autonomous parts. In Italy, feature films and theatrical performances have intervals, therefore, the Italian regulator provided for a commercial break at the time of a performance's "interval". The European Commission has expressed its disagreement on several occasions. It considered that the practice was against the provisions in the TWF Directive. The Italian interval provides for an interruption in feature films further to that laid down in the TWF Directive.

The 1997 text, as did the 1989 one, provides for advertising in performances containing intervals to be inserted between those intervals.

For the purposes of measuring airtime limits, differences appeared in the concept of “an hour”, because the definition was not clear in the 1989 TWF Directive. France opted for the concept of a “sliding hour”, where the hourly limit for advertising time must be met at any given moment during the hour. Italy and the UK chose the concept of a “clock hour”, that is, airtime limits are only measured at one moment in the hour. In Germany, the broadcasters can decide at what time to start their hour. Spain refers to a “natural hour”, but in practice, broadcasters understand it as “clock hour”, a solution that was finally adopted in the 1997 TWF Directive.

The range of restrictions in advertising limits is varied. Germany, Italy and Spain have adopted the airtime limits of the TWF Directive without further specification or differentiation. France and the UK limit commercial airtime more strictly than the TWF Directive allows, effectively reducing the availability of commercial airtime. Different restrictions apply according to types of broadcaster, whether public service or private channels, terrestrial channels or cable channels. Indeed, the two, even three, -tiered regulatory regimes in place in France, Germany, Italy and the UK contrast with the single set of rules operating in Spain. Of the five countries analysed, Spain is the only one which does not lay down stricter rules for public broadcasters, but at the same time, it is the one country in which public broadcasters most heavily rely on advertising expenditure as a source of finance.

VIII. 3. 2. Sponsorship

Tobacco manufacturers are banned from sponsoring programmes and that prohibition has been implemented across the five countries examined. Sponsorship of news and current affairs programmes is not allowed. Again, the meaning of the word “news” is usually understood to be “hard news”. The interpretation allows sponsorship of programmes such as the weather report. Under the 1997 TWF Directive, manufacturers whose main activity is the manufacture and sale of medicines are allowed to become programme sponsors, but they are not allowed to promote medicines available only on prescription.

Editorial freedom and the need for transparency in sponsorship transactions are the underlying principles of sponsorship regulation. However, the national interpretations of these principles have resulted in different frameworks for sponsorship regulation. The greater the role that advertising plays in financing television, the more advertising concerns tend to have a genuine interest in programme content and scheduling. There appears to be a fundamental ambiguity in the TWF Directive between the need to identify the sponsor properly and the need to protect viewers and broadcasters from excessive mentions of the sponsor in sponsor credits. The TWF Directive only requires that the sponsor be identified at the beginning and/or the end of the sponsored programme, and that there is a clear separation between advertising and programme content. Italy, Spain and the UK have followed the wording in the TWF Directive and also require a minimum level of identification at the beginning and/or the end of a sponsored programme. Germany requires identification at both ends, whereas France allows sponsor credits only at the beginning or at the end, but not on both occasions.

The TWF Directive does not require sponsor identification at other times. A possible reason for this is the fear of excessive advertising presence. Whereas unidentified sponsorship can become surreptitious advertising, too much identification harbours suspicions of carrying advertising intentions. The balance is decided at the national level. Although not required in the TWF Directive, more sponsor identification within the sponsored programme is certainly not banned.

In the *RTI* judgement, the ECJ confirmed that the identification requirement in the TWF Directive was a minimum one, and that Member States are allowed to permit further references to the sponsor during the programme. The ECJ also acknowledged a Member State's power to set stricter or more detailed rules. This ruling opened up an underlying ambiguity about minimum standards. Under the principle of transparency, sponsor credits are needed in order to identify the sponsor and to inform the viewer. A regulator has two options: first, to allow more sponsor credits than the minimum stated in the TWF Directive. This could be regarded as a less restrictive option, but the viewer would regularly be aware that a programme was sponsored. The second option would be to prohibit further mentions of the sponsor, and allow only the minimum requirement laid down in the TWF Directive. This measure could be regarded as a stricter interpretation, but the viewer would be less frequently informed of the relationship between the sponsor and the broadcaster. The *RTI* ruling clearly opens a door to more sponsor presence. The ECJ backed up the minimum requirement in the TWF Directive, so as to justify more mentions of the sponsor, whether for the viewer to be informed about commercial presence (e.g. the sponsor) or about the financial role of the sponsor in a programme. The ambiguity lies in which minimum standards are needed to secure transparency.

There seem to be two issues, first, sponsor credits appearing at centre breaks, and second, promotional mentions of the sponsor within the sponsored programme. The TWF Directive requires that within a sponsored programme is no praise of, or encouragement to purchase, the sponsor's products. This is justified as being for the protection of the broadcaster's editorial independence. Nothing is said about mentions of the sponsor. France, Italy, Spain and the UK allow sponsor credits at centre breaks, and the practice will be possible for German private broadcasters in late 1998. When national regulators allow mentions of the sponsor within sponsored programmes, they have to determine what level of presence is likely to encourage the purchase of the sponsor's products. France bans all mentions of the sponsor within the sponsored programme, unless it is unobtrusive and discreet. Spain allows sponsor presence if it is sporadic and unobtrusive. Germany, until now, banned bumper credits at centre breaks. Italy allows only one display of no more than five seconds of the sponsor's logo or name in programmes that last at least forty minutes. Finally, the UK considers that all promotional references to the sponsor within the sponsor programmes are unlikely to be editorially justified, and are therefore not allowed. The issue of the extent to which any sponsor presence is permissible cuts across the boundaries of what is understood by surreptitious advertising.

The duration of sponsor credits also varies. France and the UK limit them to five seconds and in Germany, regulators require credits to be "short". In practice credits last from five to seven seconds. Italy restricts sponsored trailers to eight seconds, but there is no limit on sponsor credits. Spain does not impose any limits. There are other differences between Member States in the manner in which a sponsor can be identified. France bans any reference to advertising slogans or the sponsor's products in credits. Germany also bans slogans but nothing is said about products. Italy bans advertising slogans and products from credits. In Spain, direct advertising messages cannot be mentioned in credits or within the sponsored

programmes. The UK bans the presentation of products in sponsorship credits and they must contain no reference to the sponsor's advertising campaign.

Finally, some countries lay down stricter protection for certain programme categories. In the UK, for example, sponsors are not allowed to sponsor programmes related to their economic activities, although they are allowed to sponsor "how to do programmes". Italy also bans sponsorship of consumer advice programmes.

VIII. 3. 3. Surreptitious advertising

As mentioned before, unidentified sponsorship, or unidentified mentions of a sponsor, are treated as potential surreptitious advertising. In the same way, all excess sponsor presence is also considered to be surreptitious praise of the sponsor. It appears from the research, that at the national level, the regulation of surreptitious advertising has developed within the framework of sponsorship regulation and practice.

The principle of separating advertising from programme content when dealing with surreptitious advertising is ambiguous. Again, it is unclear what aim underlies the pursuit of transparency. Overtly, the regulator sets boundaries on how much a product can appear within a given programme, whether sponsored or not, since potentially it is a form of advertising and a threat to the editorial freedom of a broadcaster. In general, the principle is that products should not be given undue prominence, that is, they should not be praised nor should their presence become an invitation to buy.

If a programme is sponsored, the issue becomes whether the sponsor can provide a product, and whether this product can be shown and praised. As mentioned before, the CoE

Convention's definition of surreptitious advertising would cover all product placement if it serves an advertising purpose, even when no payment is involved. For the TWF Directive, payment is an essential element for the placement of a product to be considered surreptitious. It is an attempt to control what appears on screen. France bans all product displays. So does Germany if their presence is not editorially justified. Italy does not refer to product placement, and Spain, in its definition of surreptitious advertising, only closes the door to "non-sporadic, non-occasional" product placement. In the UK, the ITC Code of Programme Sponsorship only allows a product to be shown when the display of the product is editorially justified and no undue prominence is given to the product, regardless of how it has been acquired. Across the five countries studied, products are allowed in game shows and viewer's competitions, if they are given as prizes to be won in those competitions. France, Italy and the UK each provide a set of detailed guidelines to cover these situations, whereas Germany and Spain only require a discreet and unobtrusive product presence.

Another aspect of surreptitious advertising has arisen with the arrival of new virtual advertising technology. This technology makes it possible for advertisers to circumvent national regulations, and adapt their advertising campaigns to the specific market that they are targeting. The broadcast of events, especially sports events that attract big audiences across Member States, can serve several sub-audiences, with implications for the broadcaster's editorial independence. In the UK, the ITC has adopted a set of guidelines on virtual advertising. The UK's more flexible statutory approach to regulation allows for a prompt response to new practices. At the European level, the European Broadcasting Union and the Association of Commercial Television have developed a Code of Practice, putting forward self-regulation as a solution to threats of virtual advertising to a broadcaster's independence.

VIII. 3. 4. Direct offers to the public

In the *RTI* case, the ECJ was also asked to define whether the phrase “direct offers to the public” could also cover forms of promotion other than teleshopping. The ECJ judged that the phrase was to be understood as an example, and could therefore be extended to cover all forms of promotion, such as telepromotions, which like direct offers to the public require more time than spot advertising. The ruling allows advertising-funded broadcasters to enjoy the extra five per cent of daily airtime that is allowed in the 1989 TWF Directive for such forms of promotion. Of the five countries studied, only France has not taken up the option to increase its daily advertising limits by five per cent to include forms of advertising such as direct offers to the public, except on cable channels. In practical terms, if French generalist broadcasters broadcast alternative types of advertising that usually last longer than traditional spots, they are constrained to include them in the maximum allowance devoted to spot advertising.

Teleshopping on dedicated channels is allowed in France, Germany and the UK, although it was not clear whether the limits in the 1989 TWF Directive applied to this type of channel. It seems from the analysis in this thesis that teleshopping acted as an umbrella category to include all new forms of advertising. But the new 1997 TWF Directive has put boundaries on the concept. Direct offers to the public are now assimilated to teleshopping, which has its own definition and is subject to general advertising provisions. Airtime for teleshopping on generalist channels has been increased from one to three hours. Teleshopping windows must last for at least fifteen minutes and there must be no more than eight of them in a day. Dedicated teleshopping channels are not within the scope of the new TWF Directive. In the light of possible future developments in digitalisation and increased interactivity in European television systems, teleshopping will lose its importance as a source of finance for generalists

channels and will increasingly become a source of programming. This will be especially true if Member States take on board the provisions of the new 1997 TWF Directive, and effectively expand airtime limits for teleshopping.

VIII. 4. Final comments

In countries where television advertising was already regulated, the TWF Directive has had some impact, especially in the legitimisation of new forms of advertising expenditure as a source of income for television. In countries where television was not strictly regulated, commercial interests tried to use the TWF Directive as a way to minimise the impact of new rules and regulations introduced by the European text.

All five Member States are committed to a semi-regulated marketplace for commercial television, the preservation of a national audio-visual industry and some level of public service broadcasting. Content issues will be difficult to solve. Especially problematic are the diverging regulations on the advertising of certain product categories, such as alcoholic drinks, or advertising targeted at children. Concepts such as “minors”, “taste and decency” or the “protection of the public interest” vary between Member States. These issues still have to be solved at the national level. Only the principle of proportionality will help smooth the differences. This principle states that if a national measure gives rise to barriers to the freedom to provide a service in the Single Market, and if the Member State concerned seeks to justify that measure by reference to one of the policy areas in Article 36 of the Treaty, for example public health, the measure will only be proportionate if it is genuinely directed towards that policy objective, it is effective in addressing that objective, and that objective cannot be achieved by other means which do not raise barriers to the freedom to provide a service. One solution proposed by the advertising community is self-regulation, which could be effective in

dealing with infractions at a pan-European level. However, self-regulation is only valid if it is effective and shifts the weight to rules of enforcement rather than relying on the structure of the system. Self-regulation at a pan-European level would only work if all Member States were equally committed to it.

On the other hand, the differences in national provisions affecting the quantity or frequency of advertising between Member States can create competitive disadvantages when national broadcasters have to compete with transfrontier ones. Although pan-European audiences are not yet strong enough to pull advertisers away from national channels, the trend towards digitalisation will intensify the fight for share of audience and adspend. Advertising-funded public service broadcasting would certainly be challenged by this. These broadcasters compete in highly competitive, but regulated, environments. They still hold strong market positions, especially in Italy and in Spain, both in audience and in advertising expenditure terms. They are likely to have an interest in how the European television marketplace, in which they operate, is regulated. In the medium term, one challenge for them is to determine their potential to act as a counterbalance to Single Market objectives and pursue European cultural diversity within the EU audio-visual policy aims.

This study shows that the differences between Member States in their legal traditions, and in the stages of development of their television advertising markets create effective barriers for the development of a Single Market in television advertising.

The text of the 1989 TWF Directive was revised in 1997. New challenges for research are raised through the implications of the remaining issues for digital radio and television systems, as well as for internet-based services. Many of the problems have been resolved, but others will no doubt remain, since they are based on cultural, political and economic differences across Member States. These differences are reflected in the national interpretations of European Directives, and an “ever closer union” for advertising and television may not be easy to achieve.

BIBLIOGRAPHY AND REFERENCES

PRIMARY SOURCES

1. Interviews by the author

France

Edouard Boccon-Gibod, Legal Department, *TF1*, Paris, June 1996.

Yves Degouzon, President, *Union des Annonceurs*, Paris, June 1996.

François Hurard, *CSA*, Paris, June 1996.

Pierre-Thierry Jouandet, *France Espace*, Paris, June 1996.

Serge Ladhuie, Advertising, Sponsorship and Teleshopping, *CSA*, Paris, June 1996.

Daniel Poinot, *Bureau de Vérification de la Publicité*, Paris, June 1996.

Brigitte Polio, Legal Services Manager, *France Espace*, Paris, June 1996.

Hélène Saillot, Legal Department, *M6*, telephone interview, November 1997.

Germany

Dr Sonia Brucker, *MediaGruppe München*, telephone interview, March 1998.

Bruno Beltrami, *Publieurope International*, London, September 1996.

Steffie Bleil, Sales Manager, *MediaGruppe München*, London, November 1996.

Dr Anja Bundschuh, *VPRT (Association of German Private Broadcasters)*, Bonn, June 1997.

Emmanuelle Machet, *European Institute of the Media*, Düsseldorf, June 1997.

Rainer Smits, *Landesanstalt für Rundfunk Nordrhein-Westfalen*, Düsseldorf, June 1997.

Katia Uhrner, *Publieurope International München*, telephone interview, May 1997.

Italy

Mario Bianchi, Sales Director, *SIPRA*, Milano, June 1996.

Patrizia Gilberti, External Relations, *Utenti Pubblicitari Associati (UPA)*, Milano, June 1996.

Vicenzo Guggino, Assistant to the General Secretary, *Istituto dell'Autodisciplina Pubblicitaria*, Milano, March 1996.

Veronica Longhi, Fininvest Comunicazioni, *Mediaset*, Milano, June 1996.

Alessandro Morselli, *Publitalia '80*, Milano, March 1996.

Alessandra Pellegrini, Legal Affairs, *Fininvest*, Milano, June 1996.

Fidelio Perchinelli, General Director, *AssAP (Italian Association of Advertising Agencies)*, Milano, June 1996.

Spain

Antonio Alvarado, Vice-Director General of Control, *Secretaría General de Comunicaciones, Ministerio de Obras Públicas, Transportes y Medio Ambiente* (now *Ministerio de Fomento*), Madrid, 30 January 1996.

José Bartolomé, *Secretaría General de Comunicaciones, Ministerio de Obras Públicas, Transportes y Medio Ambiente* (now *Ministerio de Fomento*), Madrid, December 1995.

Fernando Cadenas, Marketing Director, *TVE*, Madrid, December 1995.

Mercedes Calleja, *Autocontrol de la Publicidad*, Madrid, January 1996.

Gonzalo de la Cierva, Sales Manager, *Gestevisión Telecinco*, Madrid, December 1994.

Oscar González, Sales Director, *Publiespaña*, Madrid, January 1997

Carlos Lázaro, Sales Manager, *FORTA (Association of Regional Broadcasters)*, Madrid, April 1996.

Carmen Morán, *Unión de Consumidores de España (Spanish Consumers Association)*, Madrid, May 1996.

Antonio Rico, *Carat Spain*, Madrid, January 1996.

Juanjo Rivero, Production Manager, *Publiespaña*, February 1995.

Javier Rodríguez, Traffic and Production Manager, *Antena 3*, Madrid, September 1995.

Giuseppe Silvestroni, Special Initiatives Manager, *Publiespaña*, Madrid, June 1995.

David Torrejón, General Director, *Asociación Española de Anunciantes*, Madrid, February 1996.

UK

Ross Biggam, European Affairs Executive, *ITV*, London.

Henry Birch, Public Affairs Manager (at the time), *Turner Broadcasting System*, London, May 1997.

Nick Bryant, *Media Dimensions*, London, January 1996.

Geoffrey Draughn, *British Advertising Clearing Centre (BACC)*, London, January 1996.

Sue Eustace, Head of European Public Affairs, *ITV*, London, August 1995.

Andrew Jackson, Sales Manager, *Publieurope International*, London, October 1995.

Huw Jones, *ECM Europe*, February 1997.

Jeanie Matthew, Director, *European Public Policy Advisers*, London, October 1997.

John Raad, *IPA*, London, January 1996.

Eve Salomon, Sponsorship, *ITC*, London, October 1995.

Lionel Stanbrook, *Advertising Association*, January 1996.

Rosemary Stock, Government and Regulatory Affairs Manager, *MTV*, London, October 1995.

Frank Willis, Director of Advertising and Sponsorship, *ITC*, London, November 1995.

Keith Nichols, *Department of National Heritage*, telephone interview, May 1997.

2. Letters to the author

Heiko von Debschitz, International Affairs, *ZDF*, letters to the author of 13 May 1997 and 12 June 1997.

SECONDARY SOURCES

1. OFFICIAL DOCUMENTS

1.1. Europe

European Union

(a) Treaties

Treaty establishing the European Atomic Energy Community, Rome, 25 March 1957, in *European Union Selected Instruments Taken from the Treaties* (1995) Book 1, Vol. 2, Luxembourg:Office for Official Publications of the European Communities pp. 309-508.

Treaty establishing the European Coal and Steel Community, Paris, 18 April 1951, in *European Union Selected Instruments Taken from the Treaties* (1995) Book 1, Vol. 2, Luxembourg:Office for Official Publications of the European Communities, pp. 9-208.

Treaty establishing the European Community (as amended by the Treaty of the European Union), Rome, 25 March 1957, in *European Union Selected Instruments Taken from the Treaties* (1995) Book 1, Vols. 1 and 2, Luxembourg:Office for Official Publications of the European Communities, pp. 91-676, pp. 209-307.

Treaty of the European Union amending the Treaty of the EEC, Maastricht, 7 February 1992, OJ N°191 C of 27 July 1992, in *European Union Selected instruments taken from the Treaties* (1995) Book 1, Vol. 1, Luxembourg:Office for Official Publications of the European Communities, pp. 11-89.

Single European Act, Luxembourg, 17 February 1986, and The Hague, 28 February 1986, OJ N°169 L of 29 June 1987, in *European Union Selected Instruments Taken from the Treaties* (1995) Book 1, Vol. 1, Luxembourg:Office for Official Publications of the European Communities, pp. 739-784.

(b) Judgements of the European Court of Justice

Judgement of 18 March 1980 in Case 52/79 *Procureur du Roi v Marc JVC Debaue and others*, 1980 [ECR], 883.

Judgement of 26 April 1988 in Case 352/85 *Bond van Adverteerders and others v State of The Netherlands*, 1988 [ECR], 2085.

Judgement of 3 October 1985 in Case 311/84 *Centre Belge d'études de marché-télémarketing sa v Compagnie luxembourgeoise de télédiffusion sa and Information Publicité Bénélux sa*, 1985 [ECR], 3261.

Judgement of 25 July 1991 in Cases C-1/90 and C-176/90 *Aragonesa de publicidad exterior sa and Publivia sae v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, 1991 [ECR], I-4151.

Judgement of 25 July 1991 in Case C-353/89 *Commission of the European Communities v Kingdom of The Netherlands*, 1991 [ECR], I-4069.

Judgement of 5 October 1994 in Case C-23/93 *TV10 SA v Commissariat voor de Media*, 1994 [ECR], I-4824.

Judgement of 9 February 1995 in Case C-412/93 *Société d'importation Edouard Leclerc-Siplec v TF1 Publicité sa and M6 Publicité sa*, 1995 [ECR], I-0179.

Judgement of 10 September 1996 in Case C-222/94 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, 1996 [ECR], I-4058.

Judgement of 10 September 1996 in Case C-11/95 *Commission of the European Communities v Kingdom of Belgium*, 1996 [ECR], I-4153.

Judgement of 12 December 1996 in Joined Cases C-320/94, C-328/94, C-329/94, C-338/94 and C-339/94 *Reti Televisive Italiane SpA (RTI) v Ministero delle Poste e Telecomunicazioni and Garante per l'Editoria*, 1996 [ECR], I-6471.

Judgement of 29 May 1997 in Case C-14/96 *Etat Belge v Paul Denuit*, 1997 [ECR], I-2785.

Judgement of 5 June 1997 in Case C-56/96 *VT4 v Flemish Community*, 1997 [ECR], I-3143.

Judgement of 9 July 1997 in Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v De Agostini (Svenska) Förlag AB*, OJ N°252 C of 16 August 1997, 12; published in *Common Market Law Review*, Vol. 34, N°6, December 1997, pp. 1445-1468.

(b) Judgement of the Court of the EFTA

Judgement of 16 June 1995 in Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia and Lego Norge SA*, Report of the EFTA Court, 1 January 1994-30 June 1995, p. 113.

(c) Directives

Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer, OJ N°33 L of 8 February 1979, 1.

Council Directive 84/450/EEC on Misleading Advertising, OJ N°250 L of 19 September 1984, 17.

Council Directive 89/552/EEC of 3 October 1989 on the co-ordination of certain provisions laid down by law, regulation of administrative action in Member States concerning the pursuit of television broadcasting services, OJ N°298 L of 17 October 1989, 23.

Council Directive 91/321/EEC of 14 May 1991 on infant formulae and follow on formulae, OJ N°175 L of 4 July 1991, 35.

Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products for human use, OJ N°113 L of 30 April 1992, 13.

European Parliament and Council Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ N°144 of 4 June 1997, 19.

European Parliament and Council Directive 97/36/EC of 30 June 1997 amending Council Directive 89/552/EEC, OJ N°202 L of 30 July 1997, 60.

European Parliament and Council Directive 97/55/EC of 6 October 1997 amending Council Directive 84/450/EEC so as to include comparative advertising, OJ N°290 L of 23 October 1997, 18.

(d) Draft Directives and reports on application

Commission of the European Communities (1986) Proposal for a Council Directive on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, COM(86) 146 final, Brussels, 6 June 1986, OJ N°179 C of 17 July 1986, 4.

- (1988) Amended proposal for a Directive on broadcasting activities, COM(88) 154 final, Brussels, 21 March 1988, OJ N°110 C of 24 April 1988, 3.

- (1989) Re-examined proposal for a Council Directive on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities, COM(89) 247 final-SYN 52, Brussels, 26 May 1989, Luxembourg:Office for Official Publications.

- (1992) Modified proposal for a Directive on tobacco products, COM(92) 196 final, OJ N°129 C of 21 May 1992, 5.

- (1995) Report on Application of Directive 89/552/EEC and Proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, presented by the Commission on 31 May 1995, COM(95) 86 final-95/0074(COD), OJ N°185 C of 19 July 1995, 4.

- (1996) Explanatory Memorandum to the amended proposal for a European Parliament and Council Directive amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation and administrative action in Member States concerning the pursuit of television broadcasting activities, COM(96) 200 final- 95/0074(COD), Brussels, 7 May 1996, Luxembourg:Office for Official Publications.

- (1997) Second Report from the Commission to the European Parliament, the Council and the Economic and Social Committee on the application of Directive 89/552/EEC "Television without Frontiers", COM(97) 523 final, Brussels, 24 of October 1997, Luxembourg:Office for Official Publications.

(d) Green Papers

Commission of the European Communities (1984) Green Paper on the establishment of the Common Market for broadcasting especially by satellite and cable, "Television without Frontiers", and Working Document, COM(84) 300 final, Brussels, 14 June 1984, Luxembourg:Office for Official Publications.

- (1996) Commercial Communications in the Internal Market, Green Paper and Working Document, COM(96) 192 final, Brussels, 8 May 1996, Luxembourg:Office for Official Publications.

(e) European Parliament documents

European Parliament (1982) Report on radio and television broadcasting in the European Community on behalf of the Committee on Youth, Culture, Education and Sport (The Hahn Report), Doc. 1-1013/81, Luxembourg:Office for Official Publications.

- (1982a) Resolution on the Establishment of a uniform standard in the European Community (The Hahn Resolution) of 12 March 1982, OJ N°87 C of 5 April 1982, 110.

- (1987) Report on the European Commission's proposal to the Council for a Directive on broadcasting (COM(86) 146 final-Document C2-38/86), EP A-2/0246/87 of 8 December 1987, Luxembourg:Office for Official Publications.

- (1989) Common Position adopted by the Council on 13 April 1989 for the adoption of a Directive on broadcasting activities, Document C2-23/89, 5858/89, SEC(89) 595-SYN 52, Luxembourg:Office for Official Publications.

- (1989a) Recommendation of the Committee on Legal Affairs and citizen's rights on the Common Position of the Council on the proposal for a Council Directive on broadcasting activities (Document C2-23/89), EP A2-159/89, 22 May 1989, Luxembourg:Office for Official Publications.

- (1992) Amended proposal for a Council Directive on advertising of tobacco products (COM(91) 111-Document C3 0268/91 SYN 194), OJ N°67 C of 16 March 1992, 35.

- (1992a) Opinion on the proposal for a Council Directive on advertising for tobacco products, Economic and Social Committee, OJ N°313 C of 30 November 1992, 27.

(f) Press Releases

Council of the European Union, Press Release 11717/95 (Presse 329), 1884th meeting of the Council, Audio-visual/Cultural Affairs, Brussels, 20 November 1995.

- Press Release 8774/89 (Presse 166), 1349th Council meeting, General Affairs, Luxembourg, 3 October 1989.

European Commission, IP/95/287, *Television without Frontiers: new rules and legal framework for the internal market information society services*, 22 March 1995.

- IP/93/396, *Telepromotions and European Directive*, Brussels, 24 May 1993.

- IP/97/1154, *Commission takes Italy to the Court of Justice for failure to transpose the Television without Frontiers Directive*, Brussels, 18 December 1997.

Council of Europe

(a) European Court of Human Rights

Casado v. Spain (24/2/94) 1994 [EHRR], Vol. 18, 1-27.

(b) Conventions

Council of Europe, *European Convention of Human Rights*, Strasbourg, 1978.

Council of Europe, *European Convention on Transfrontier Television and Explanatory Report*, STE N°132, Strasbourg, 17 March 1989.

(c) Other documents

Council of Europe, Human Rights, “Programme Sponsorship and New Forms of Commercial Promotion on Television”, *Mass Media Files N°9*, Strasbourg, 1991.

Council of Europe (1997) “Opinions and recommendations adopted by the Standing Committee on Transfrontier Television”, T-TT (97) Inf 2, Strasbourg, September.

1. 2. National law, regulation and administrative action

France

(a) Law and regulation

Law 82-652 of 29 July 1982 on audiovisual communication, JORF of 30 July 1982, 2431.

Law 86-1067 of 30 September 1986 on the freedom of communication, modified and completed, JORF of 1 October 1986, 11755, in *Les brochures du CSA*, July 1996.

Law 88-21 of 6 January 1988 on telepromotion activities involving direct offers to the public, or teleshopping, JORF of 7 January 1988, 271.

Law 89-25 of 17 January 1989 amending Law 86-1067 of 30 September 1986 on the freedom of communication, JORF of 18 January 1989, 728.

Law 91-32 of 10 January 1991 against tobacco and alcoholism (*Loi Evin*), JORF of 12 January 1991, 615.

Law 93-122 of 29 January 1993 for the prevention of corruption and the transparency of the economic life and public procedures (*Loi Sapin*), JORF of 30 January 1993, 1588.

Law 94-43 of 18 January 1994, *Loi du médicament* included in the *Code de la Santé Publique*, JORF of 19 January 1994, 963.

Law 94-88 of 1 February 1994 amending Law 86-1067 of 30 September 1986 on the freedom of communication, JORF of 2 February 1994, 1800.

Decree 87-37 of 26 January 1987 in application of Article 27(1) of Law 86-1067 of 30 September 1986, regulating advertising and sponsorship for certain television services, JORF of 27 January 1987, 946.

Decree 87-43 of 30 January 1987 fixing the *Cahier des Charges* of TF1, JORF of 31 January 1987, 1140.

Decree 88-607 of 6 May 1988 amending Decree 87-37 of 26 January 1987 fixing the rules for advertising and sponsorship for certain television services, JORF of 8 May 1988, 6611.

Decree 90-66 of 17 January 1990 laying down general principles on the broadcast of films and audio-visual works, amended by Decrees 91-822 of 29 August 1991, 91-1306 of 26 December 1991 and 92-279 of 27 March 1992, JORF of 18 January 1990, 757.

Decree 90-174 of 23 February 1990 on the classification of audio-visual works, JORF of 25 February 1990, 2450.

Decree 92-882 of 1 January 1992 amended by Decree 95-77 of 24 January 1995 regulating cable radio and television, JORF of 25 January 1995, 1339.

Decrees 92-279-280-281 of 27 March 1992 in application of Article 27(1) of Law 86-1067 of 30 September 1986, regulating advertising and sponsorship, JORF of 28 March 1992, 4313.

Decree 95-77 of 24 January 1995 regulating cable television, JORF of 25 January 1995, 1339.

Ministerial Decree 94-813 of 16 September 1994 approving the *Cahiers des missions et des charges* of France 2 and France 3, JORF of 18 September 1994, 13378.

(b) Administrative action

CNCL Decision 87-2 of 15 January 1987, JORF of 27 January 1987, 967.

CNCL Decision 87-30 of 17 April 1987 on the powers of the CNCL, JORF of 6 May 1987, 35033.

CNCL Decision 87-43 fixing the *Cahier des Charges* of TF1, JORF of 19 June 1987, 6619.

CNCL Decision 87-327 of 7 December 1987 regulating sponsorship, JORF of 9 December 1987, 14330.

CNCL Recommendation of 7 December 1987 on sponsorship rules applicable to private broadcasters, JORF of 9 December 1987, 14331.

CNCL Decision 88-36 of 4 February 1988 regulating the broadcast of teleshopping, JORF of 10 February 1988, 493.

CNCL Decision 88-261 of 3 June 1988 modifying Decision 88-36 of 4 February 1988 regulating the broadcast of teleshopping, JORF of 18 June 1988, 8159.

CSA Decision 90-922 of 11 December 1990 modifying CNCL Decision 88-36 of 4 February 1988 regulating the broadcast of teleshopping, JORF of 19 January 1991, 1019.

CSA *Avis* 91-4 of 25 July 1991 on the proposal for a Decree regulating advertising and sponsorship on certain television services, JORF of 20 August 1991, 10973.

CSA Decision 92-972 of 20 October 1992, modifying CNCL Decision 88-36 of 4 February 1988 on the broadcast of teleshopping, JORF of 11 November 1992, 15558.

CSA Decision 94-399 of 7 July 1994 imposing a sanction on TF1, JORF of 23 July 1994, 10636.

CSA, "*Rapports Presse/Télévision et émissions de jeu de concours: le CSA écrit aux chaînes*", Letters to all broadcasters on the regulation of the Press-Television relationships

and the organisation of game shows and competitions, in *Lettre du CSA*, N°71, August 1995, pp. 11-12.

CSA Decision 95-743 of 6 November 1995 inflicting a sanction on the company France 2, JORF of 26 November 1996, 17220.

CSA Decision 95-919 of 21 December 1995 inflicting a sanction on the company Métropole Télévision (M6), JORF of 19 January 1996, 918.

Rapport Jean Cluzel 91-92 of 19 November 1991 on the situation of the French audio-visual sector in the eve of the European Single Market, *Document Sénat 384, deuxième session ordinaire*, Paris:JORF Publications.

Germany

(a) Law

Basic Law for the Federal Republic of Germany, 23 May 1949, amended by the Unification Treaty, 3 October 1990, Bonn:Press and Information Office of the Federal Government.

Gesetz gegen den unlauteren Wettbewerb, 27 July 1994, in Nickel, V. (1994) *Werbung in Grenzen, Report über Werbekontrolle in Deutschland*, Bonn:ZAW, pp. 77-84.

Gesetz über die Werbung auf dem Gebiete des Heilwesens of 20 December 1996, BGBl. I, 2084, in *Recht in Hörfunk & Fernsehen* (1997) loose binding report, March, Ulm:Neue Mediengesellschaft Ulm GmbH.

Lebensmittel -und Bedarfsgegenstandesgesetz of 15 August 1974, BGBl. I-1945 in *Recht in Hörfunk & Fernsehen* (1997) loose binding report, March, Ulm:Neue Mediengesellschaft Ulm GmbH.

(b) Regulation

Rundfunkstaatsvertrag, Inter-Land agreement on broadcasting of 31 August 1991, English translation in *Gesetzestexte, Inter nationes*, Bonn, 1996.

Rundfunkstaatsvertrag, third amendment of 26 August 1996, in *MediaPerspektiven Dokumentation*, N°I, 1996.

(c) Administrative action

Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen of 26 January 1993, amended on 8 November 1994.

Vorlag, Entwurf zur Änderung der Richtlinien zur Werbung, zur Trennung von Werbung und Programm und für das Sponsoring im Fernsehen, February 1997.

Italy

(a) Law and regulation

Law 223 of 6 August 1990 on the regulation of public and private broadcasting, *Gazzetta Ufficiale*, N°185, *Supplemento Ordinario*, of 9 August 1990, 3.

Law 10 of 4 February 1985 laying down urgent provisions for radio and television, *Gazzetta Ufficiale*, N°30 of 5 February 1985, in Golfari, C. (1994) *Oltre la Mammì*, Milano:Il Sole 24 Ore libri, pp. 114-118.

Decree-Law 408 of 19 October 1992 co-ordinated with Conversion Law 483 of 17 December 1992 laying down urgent provisions for advertising on radio and television, *Gazzetta Ufficiale*, N°297 of 18 December 1992, in Golfari, C. (1994) *Oltre la Mammì*, Milano:Il Sole 24 Ore libri, pp. 114-118.

Decree of the President of the Republic 255 of 27 March 1992, *regolamento di attuazione* of Law 223 of 6 August 1990 regulating public and private radio and television, *Gazzetta Ufficiale* N°77 of 1 April 1992, *Supplemento Ordinario, Serie Generale*, 5.

Decree-Law 323 of 27 August 1993 co-ordinated with Conversion Law 422 of 27 October 1992 laying down urgent provisions for radio and television, *Gazzetta Ufficiale*, N°253 of 27 October 1993, in Golfari, C. (1994) *Oltre la Mammì*, Milano:Il Sole 24 Ore libri, pp. 200-208.

Legislative Decree 74 of 25 January 1992 transposing Directive 84/450/EEC on misleading advertising, *Gazzetta Ufficiale*, N°36 of 13 February 1992, *Supplemento Ordinario*, in Golfari, C. (1994) *Oltre la Mammì*, Milano:Il Sole 24 Ore libri, pp. 185-191.

Legislative Decree 541 of 30 December 1992 transposing Directive 92/28/EEC on the advertising of medicinals for the human use, *Gazzetta Ufficiale*, N°7 of 11 January 1993, *Serie Generale*, 100.

Ministerial Decree 439 of 4 July 1991 regulating the sponsorship of radio and television programmes, *Gazzetta Ufficiale*, N°19 of 24 January 1992, *Serie Generale*, 8.

Ministerial Decree 425 of 30 November 1991 transposing Articles 13, 15 and 16 of Council Directive 89/552/EEC of 3 October, on the advertising on television of tobacco products,

alcoholic drinks and the protection of minors, *Gazzetta Ufficiale*, N°4 of 7 January 1992, *Serie Generale*, 6.

Ministerial Decree 581 of 9 December 1993 regulating sponsorship of radio and television programmes and direct offers to the public, *Gazzetta Ufficiale*, N°8 of 12 January 1994, *Serie Generale*, 7.

Spain

(a) Law and draft documents

Law 4/1980 of 10 January 1980 of the Statute of Radio and Television, BOE N°11 of 12 January 1980, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 39-44.

Law 46/1983 of 26 December 1983 of Third Television Channel, BOE N°4 of 5 January 1984 in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 51-44.

Law 31/1987 of 18 December 1987 of Telecommunications (LOT), BOE N°303 of 19 December 1987, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 59-70.

Law 10/1988 of 3 May 1988 of Private Television, BOE N°108 of 5 May 1988, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 83-86.

Law 34/1988 of 11 November 1988, General Law on Advertising, BOE N°274 of 15 November 1988, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 89-94.

Law 35/1992 of 22 December 1992 of Satellite Television, BOE N°308 of 24 December 1992, later derogated by Law 37/1995 of 12 December 1995, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 107-108.

Law 25/1994 of 12 July 1994 of Transposition of Council Directive 89/552/EEC, BOE N°166 of 13 July 1994, 16224.

Law 37/1995 of 12 December 1995 of Satellite Telecommunications, BOE N°297 of 13 December 1995, 35705.

Law 42/1995 of 22 December 1995 of Cable Telecommunications, BOE N°306 of 23 December 1995, 36790.

Proposal of the Special Commission on television content for the creation of a High Authority for audio-visual media (650/000002), Senate, *Boletín Oficial de las Cortes Generales*, N°342 of 13 November 1995, 1.

Proposal for Law of Transposition of Directive 89/552/EEC, *Boletín Oficial de las Cortes Generales, Congreso de Diputados*, of 25 January 1994, N°47-1, As.:121/000029, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 19-27.

UK

(a) Law

Broadcasting Act 1990, Halsbury's Statutes, fourth edition, Vol. 45, pp. 333-628.

Trade Marks Act 1994, Halsbury's Statutes, fourth edition, Vol. 48, pp. 114-213.

(b) Administrative action

ITC Code of Advertising Standards and Practice, London, Summer 1997.

ITC Code of Programme Sponsorship, London, March 1997.

ITC Programme Code, London, January 1993.

ITC Rules on Advertising Breaks, London, January 1991.

ITC, Review of ITC Code of Programme Sponsorship, Explanatory Memorandum of Draft Code, London, September 1996.

ITC Advertising Guidance, Code of Advertising Standards and Practice:

Note 1, Appendix 3, Medicines, Treatments, Health Claims, Nutrition and Dietary Supplements, Rule 15: Cure, July 1997.

Note 2, Rule 20: Health and Safety, July 1997.

Note 3 (provisional), Rule 8: Captions and Superimposed Text, July 1997.

Note 4, Rule 21: Motor Cars and Driving, July 1997

Note 5: Betting tipster advertising on teletext services, July 1997.

Note 6, Appendix 5, Religious Advertising, Rule 5(ii): Unacceptable Advertisers, July 1997.

Note 7, revised, Rule 19: Lotteries, Pools and Bingo, July 1997.

Note 9, Television Advertising Scheduling Restrictions: Children and Young People, July 1997.

Note 10, Rule 20(b): Health and Safety, July 1997.

Note 11, Services Ancillary to Programmes included in Channel 3, 4 and 5 services, July 1997.

ITC Sponsorship Guidance Note, "Electronic Imaging Systems or "Virtual" Advertising", Issue 1, August 1997.

ITC Sponsorship Guidance Note 1, Viewers' Competitions, Review of the ITC Code of Sponsorship, Explanatory Memorandum, September 1996.

2. SEMI-OFFICIAL DOCUMENTS AND SELF-REGULATORY CODES

Europe

ICC Code of Advertising Practice, in Maxeimer, J. and Schotthöfer, P. (1992) *Advertising Law in Europe and North America*, Boston: Kluwer, Appendix 1, 365.

European Broadcasting Union, *Principles on advertising for internationally televised sports events*, May 1986, in Council of Europe (1991) *Mass Media Files N°9*, Appendix IV, Strasbourg.

European Broadcasting Union and Association of Commercial Television, Code of Practice, Virtual Advertising, December 1997.

France

Bureau de Vérification de la Publicité (BVP), *Règles relatives à la publicité télévisée et au parrainage*, in *European Advertising Standards Alliance*, "Survey of National Regulatory Systems for Television", Brussels, February, 1995.

Principes relatifs à la télédiffusion sur les chaînes françaises d'événements sportifs se déroulant en France ou à l'étranger comportant des panneaux publicitaires en faveur des boissons alcooliques, in *La Loi du 10 janvier 1991, bilan après 5 ans d'application*, study by *Enterprise et Prévention*, Annex 7, Paris, 1996.

Germany

Deutsche Werberat, *Verhaltensregeln des Deutschen Werberats über die Werbung für alkoholische Getränke*, 1992, in Nickel, V. (1994) *Werbung in Grenzen, Report über die Werbekontrolle in Deutschland*, Bonn:ZAW, pp. 130-131.

ZDF-Richtlinien für Werbung und Sponsoring of 7 October 1994, in *MediaPerspektiven Dokumentation*, N°I, 1995.

ARD-Richtlinien für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring of 28 November 1994, in *ARD-Jahrbuch*, 1995.

Italy

Self-regulation Code of Practice of commercial television services, on the protection of minors, *Codice di regolamentazione convenzionale dei principi, delle norme e delle regole cui si attengono le televisioni commerciali ai fini di assicurare il rispetto dei diritti e delle esigenze di un armonioso sviluppo dei telespettatori in età evolutiva*, Federation of Radio and Television, Rome, 19 May 1993, in <http://www.publitalia.it/>, February 1998.

Società per Azioni Commerciale Iniziative Spettacolo (SACIS), *Norme per la realizzazione della pubblicità radiotelevisiva diffusa dalla RAI*, SACIS International, Rome, January 1995.

Agreement UPA/ASSAP/ASSOMEDIA-SIPRA on insertion rules for advertising on television in order to maximise advertising airtime, and Guidelines on advertising clutter, Milan, 21 June 1996, mimeo.

Istituto dell'Autodisciplina Pubblicitaria, *Codice dell'Autodisciplina Pubblicitaria*, 25th edition, 30 March 1997.

Agreement UPA/ASSAP/ASSOMEDIA/FININVEST on the insertion rules for advertising on television in order to optimise advertising airtime, Milan, 16 January 1995, amended 1 April 1997, mimeo.

Spain

Autocontrol de la Publicidad, *General Norms for Advertising Self-regulation*, Madrid, 13 June 1979.

Norms regulating advertising on the EITB-RTVV media (Basque Media) of 13 September 1983, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 193-200.

Norms regulating advertising on Catalan media of 16 January 1984, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 207-212.

Norms regulating advertising on the RTG media (Galicia) of 12 May 1986, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 213-220.

Norms regulating advertising on Canal Sur S.A., (Andalucía) of 28 September 1988, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 221-226.

Norms regulating advertising on the RTVM media (Madrid) of 24 May 1989, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 227-234.

Norms regulating advertising on RTV (Valencia) of 21 June 1989, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 235-244.

RTVE, Advertising Sales, *Rules for Special Advertising Within Programmes*, "El Precio Justo", N°179-B, Madrid, 23 October 1989.

Resolution of the General Directorate of the Media of 17 April 1990, making public RTVE's admission norms for advertising, *Boletín Oficial del Estado*, N°155 of 29 June 1990, in *Radiodifusión Televisiva, Secretaría General del Congreso de los Diputados*, Documentation for the transposition of Directive 89/552/EEC, Documentation N°113, pp. 95-98.

UK

ISBA, Guidelines on sponsorship proposed by the Incorporated Society of British Advertisers, February 1988, in Council of Europe (1991) *Mass Media Files N°9*, Appendix VI, Strasbourg.

Broadcast Advertising Clearance Centre (BACC), Notes of Guidance for Broadcast Advertising, London, 1994.

PAGB Code of Standards of Advertising Practice for Over the Counter Medicines, London, 1994 edition.

Voluntary agreement on sponsorship of tobacco by tobacco companies in the UK reached by the Minister for Sport and the Tobacco Manufacturers Association, and Code of Practice, Department of National Heritage, London, 31 January 1995.

BBC World-Wide, Guidelines for Sponsorship on the BBC's International Television Channels, BBC Editorial Policy, London, 26 January 1996.

BBC Producers' Guidelines, London, November 1996.

3. BOOKS

3.1. Books

Andersen, R. (1995) *Consumer, Culture & Television Programming*, Colorado:Westview Press.

Barbrook, R. (1995) *Media Freedom, the contradictions of communications in the age of modernity*, London:Pluto Press.

Barendt, E. (1993) *Broadcasting Law*, Oxford:Clarendon Press.

Bennett, R. (1993) *The Handbook of European Advertising*, London:Kogan Page.

Collins, R. (1993) *Audiovisual and Broadcasting Policy in the European Community*, European Dossier Series, N°23, London:University of North London Press.

- (1994) *Broadcasting and Audio-visual policy in the European Single Market*, London:John Libbey.

Collins, R., Garnham, N. and Locksley, G. (1988) *The Economics of Television: the UK case*, London:Sage.

Dinan, D. (1994) *Ever Closer Union? An introduction to the European Community*, Nugent, N., Paterson, W.E., Wright, V. (eds.), The European Union Series, London:Macmillan.

Dunnett, P. (1990) *The World Television Industry: an economic analysis*, London:Routledge.

Dyson, K. and Humphreys, P. (1990) *The Political Economy of Communications, International European Dimensions*, London:Routledge.

European Institute for the Media (1987) *Towards a European Common Market, a contribution to the debate*, Manchester:The European Institute for the Media.

Ford, B. and J. (1993) *Television and Sponsorship*, Oxford:Butterworth-Heinemann Ltd.

Fusi, M. and Tesa, P. (1996) *Diritto e Pubblicità*, Milano:Lupetti.

Golfari, C. (1994) *Oltre la Mammi*, Milano:Il Sole 24 Ore Libri.

Groombridge, B. and Hay, J. (eds.) (1995) *The price of choice, public service broadcasting in a competitive European market place*, Proceedings of the second Voice of the Listener and Viewer international conference on the future of public service broadcasting, London:John Libbey.

Herrmann, G. (1994) *Rundfunkrecht, Fernsehen und Hörfunk mit neue Medien*, München:Verlag CHBeck.

Hoffmann-Riem, W. (1988) "Europäisierung des Rundfunks-aber ohne Kommunikationsverfassung?", in *Rundfunk in Wettbewerbsrecht*, Hoffmann-Riem, W. (ed.), Baden-Baden:Nomos Verlag, pp. 201-223.

Humphreys, P. (1996) *Mass Media and Media Policy in Western Europe*, Manchester:Manchester University Press.

Kent, P. (1996) *Law of the European Union*, sixth edition, London:Butterworths.

Kuhn, R. (1995) *The Media in France*, London:Routledge.

Lasok, D. (1994) *Law and Institutions of the European Union*, sixth edition, Lasok & Bridge series, London:Butterworths.

Martín y Pérez de Nanclares, J. (1995) *La directiva de televisión: fundamento jurídico, análisis y transposición al derecho de los estados miembros de la Unión Europea*, Madrid:COLEX.

Mattelart, A. (1991) *Advertising International: the privatisation of public space*, London:Routledge.

Maxeimer, J. and Schotthöfer, P. (1992) *Advertising Law in Europe and North America*, Boston:Kluwer.

Noam, E. (1991) *Television in Europe*, Oxford:Oxford University Press.

Noll, R. G. and Owen, B. M. (1983) *The Political Economy of Deregulation, Interest Groups in the Regulatory Process*, American Enterprise Institute for Public Policy Research, Studies in Government Regulation, Washington DC:AEI.

Nugent, N. (1994) *The Government and Politics of the European Union*, The European Series, Third edition, London:Macmillan.

OECD (1993) *Competition Policy and a Changing Broadcast Industry*, Paris:OECD.

Pilati, A. (ed.) (1993) *Media Industry in Europe*, Institute of Media Economics (MIND), London:John Libbey.

Porter, V. and Hasselbach, S. (1991) *Pluralism, Politics and the Marketplace, the Regulation of German Broadcasting*, London:Routledge.

Richeri, G. (1993) *La TV che conta, televisione come impresa*, Milano:Baskerville.

Rijkens R. and Miracle, G. E. (1986) *European Regulation of Advertising*, Amsterdam:Elsevier.

Robillard, S. (1995) *Television in Europe: Regulatory Bodies Status, Functions and Powers in 35 European Countries*, European Institute for the Media Monograph 19, London:John Libbey.

Schwartz, I. E. (1990) “*La liberté d’expression (Art.10 CEDH) et la libre prestation des services (Art. 59 Traité CEE) dans le domaine de la radiodiffusion télévisuelle*”, in *Transfrontier Television in Europe:the Human Rights Dimension*, Cassese, A. and Clapham, A., (eds.), Baden-Baden:Nomos Verlag, pp. 165-214.

Silj, A. (ed.) (1992) *The new television in Europe*, London:John Libbey.

Siune, K. and Truetzchler, W. (eds.) (1992) *Dynamics of Media Politics*, Broadcast and Electronic Media in Western Europe.

Stubbe Ostergaard, B. (ed.) (1997) *The Media in Western Europe*, the Euromedia Handbook, second edition, The European Research Book, London:Sage Publications.

Thody, Ph. (1997) *An historical introduction to the European Union*, London:Routledge.

Weatherill, S. (1995) *Law and Integration in the European Union*, Clarendon Law Studies, Oxford:Oxford University Press.

Wedell, G. and Luyken, G. M. (1986) *Media in Competition*, Manchester:European Institute for the Media.

Wildman, S. and Siwek, S. (1988) *International Trade in Films and Television Programs*, American Enterprise Institute, Cambridge, Mass:Ballinger Publishing Company.

3. 2. Chapters in books

Allen, D., Llewellyn, D. and Swann, D. (1993) “A forward view” in *The Single European Market and Beyond, a study of the wider implications of the Single European Act*, Swann, D. (ed.), London:Routledge, pp. 251-267.

Cave, M. and Williamson, P. (1995) “The Regulation of British Broadcasting”, in *The Regulatory Challenge*, Bishop, M., Kay, J. and Mayer, C. (eds.), Oxford:Oxford University Press, pp. 160-190.

Curran, J. (1986) "The impact of advertising on the British mass media" in *Mass Culture and Society, a critical reader*, Collins, R., Curran, J., Garnham, N., Scannell, P., Schlesinger, Ph., and Sparks, C. (eds.), London:Sage Publications, pp. 309-335.

De Ben, E., Kelly, M. and Bake, M. (1992) "Television Content: Dallasification of Culture?", in *Dynamics of Media Politics*, Siune and Truetzschler (eds.), The Euromedia Research Group, London:Sage Publications, pp. 75-100.

Dyson, K. and Humphreys, P. (1992) "The Context of New Media Politics in Western Europe", in *Broadcasting and New Media Policies in Western Europe*, Dyson, K. and Humphreys, P. with Negrine, R. and Simon, J-P. (eds.), London:Routledge, pp. 1-61.

- (1992) "Regulatory Change in Western Europe: From National Cultural Regulation to International Economic Statecraft", *ibid.* pp. 92-160.

Hirsch, M. and Petersen, V. G. (1992) "Regulation of Media at the European Level", in *Dynamics of Media Politics: Broadcast and Electronic Media in Western Europe*, Siune, K. and Truetzschler (eds.), London:Sage, pp. 42-56.

Hultén, O. and Brants, K. (1992) "Public Service Broadcasting: reactions to competition", in *Dynamics of Media Politics*, Siune and Truetzschler (eds.), The Euromedia Research Group, London:Sage Publications, pp. 116-127.

Hurard, F. (1995) "*La publicité audiovisuelle*", in *Droit de l'audiovisuel*, Gavalda, Ch. and Piaskowski, N. (eds.), Paris:LAMY, pp. 707-749.

Jezebel, J-P. and Pine, G. (1992) "French Television", in *The New Television in Europe*, Silj, A. (ed.), London:John Libbey, pp. 429-524.

Kleinstauber, H. (1992) "Federal Republic of Germany", in *The Media in Western Europe*, Stubbe Ostergaard (ed.), European Media Research Group, second edition, London:Sage, pp. 75-94.

Locksley, G. (1989) "Television Business in Europe: the big picture" in *The Broadcasting Debate: the European Experience*, Nowell-Smith G.(ed.), London:BFI, pp. 7-22.

- (1992) "The new television and the European regulatory authorities", in *The New Television in Europe*, Silj, A. (ed.), London:John Libbey, pp. 127-136.

McGowan, F. and Seabright, P. (1995) "Regulation in the European Community and its impact on the UK", in *The Regulatory Challenge*, Bishop, M., Kay, J. and Mayer, C., (eds.), Oxford: Oxford University Press, pp. 227-253.

Melody, W. H. (1988) "Pan European Television: Commercial and Cultural Implications of European Satellites" in *Television and its audiences*, Drummond, P. and Paterson, R., (eds.), London:BFI, pp. 267-281.

Negrine, R. and Papathanassopoulos, S. (1990) "The funding of programmes in the age of internationalisation", in *The Internationalisation of Television*, Negrine, R. and Papathanassopoulos, S. (eds.), London:Pinter, pp. 105-128.

O'Dowd, J. T. (1997) "Broadcasting Policy and European Law", in *Law and the Media, Views of Journalists and Lawyers*, McGonagle, M. (ed.), Dublin:Round Hall Sweet & Maxwell, pp. 257-302.

Owen, R. and Dynes, M. (1992) "Satellite broadcasting, television technology in the 1980's", in *The Times Guide to the Single European Market*, London:Times Books, pp. 219-233.

Papathanassopoulos, S. (1990) "Broadcasting and the European Community: the Commission's audio-visual policy", in *International European Dimensions*, Dyson, K. and Humphreys, P. (eds.), London:Routledge, pp. 107-124.

Porter, V. (1990) "The Janus character of television broadcasting", in *The Single European Market and the Information and Communication Technologies*, Locksley, G. (ed.), Studies in the Information Economy, London:Belhaven Press, pp. 59-72.

Schiller, H. I. (1971) "The international commercialisation of broadcasting" in *Mass Communications and American Empire*, Boston, Mass.:Beacon Press, pp. 94-103.

Siliato, F. (1992) "The European Advertising Market: comparisons and analysis" in *The new television in Europe*, Silj, A. (ed.), London: John Libbey, pp. 137-148.

Simon, J-P. (1992) "New Media Policies and the Politics of Central-Local Relations in France", in *Broadcasting New Media Policies in Western Europe*, Dyson, K. and Humphreys, P. with Negrine, R. and Simon, J-P.(eds.), London:Routledge, pp. 161-184.

Singleton, S. (1996) "Legislative Acts" in *Butterworths Expert Guide to the European Union*, Monar, J., Neuwall, N., O'Keeffe and Robinson, W. (eds.), London:Butterworths, pp. 216-217.

Sturgess, B. (1992) "Television advertising" in *Paying for broadcasting, the handbook*, Congdon, Sturgess, NERA, Shew, Graham, Davies (eds.), London:Routledge, pp. 1-37.

Swann, D. (1993) "The single market and beyond-an overview", in *The Single European Market and Beyond, a study of the wider implications of the Single European Act*, Swann, D. (ed.), London:Routledge, pp. 3-23.

5. THESES

Gantrias, G. (1995) *Advertising Regulation in the UK*, Doctoral Thesis in Communications, (unpublished), City University, London, UK.

De Salas, A. (1997) "*Communication commerciale et télévision: Droit européen et comparé*", Doctoral Thesis in Law, University Panthéon-Assas, Paris II, France, Marseille:Presses Universitaires d'Aix-Marseille/Economique.

6. JOURNAL AND PRESS ARTICLES

6. 1. Articles in academic journals

Andreatta, E. and Pedde, G. (1995) "Broadcast Regulation in Italy", *Entertainment Law Review*, Vol. 6, Issue 1, January-February, pp. 7-12.

Beth, H. (1995) "Current constitutional aspects of the German broadcasting system", *Media Law Practice*, July, pp. 56-59.

Clemens, J. (1987) "TV advertising in Europe: the emerging opportunities", *Columbia Journal of World Business*, Vol. 22, Fall, pp. 35-55.

Circus, Ph. (1989) "Alcohol Advertising-The Rules", *International Journal of Advertising* Vol. 8, N°2, pp 159-165.

Collins, R. (1994) "Unity in Diversity? The European Single Market in Broadcasting and the Audio-visual, 1982-92", *Journal of Common Market Studies*, Vol. 332, N°1, March, pp. 89-102.

Corredoira, L. (1996) "Unión Europea e Información. Análisis de un nuevo régimen jurídico para España", *Comunicación y Sociedad, Revista de la Facultad de Ciencias de la Información*, University of Navarra, Vol. IX, Nos.1 and 2, pp. 129-173.

European Broadcasting Union (1990) "EBU Commentary on the "Television without Frontiers" Directive and the European Convention on Transfrontier Television", *EBU Review, Programmes, Administration, Law*, Vol. XLI, N°4, July, pp. 6-16.

Davies, S. (1994) "Home Shopping Broadcasting: Enough is Enough (Plus Postage and Packing)", *Entertainment Law Review*, Vol. 5, Issue 4, pp. 111-113.

Dehousse, R. (1992) "Integration v. Regulation? On the dynamics of regulation in the European Community", *Journal of Common Markets Studies*, Vol. XXX, N°4, December, pp. 383-402.

De Salas, A. (1991) "La regulación de la publicidad televisada y del patrocinio de programas en el ámbito europeo", *Comunicación y Sociedad, Revista de la Facultad de Ciencias de la Información*, Universidad de Navarra, Pamplona, Vol. IV, Nos. 1 and 2, pp. 83-97.

Dibb, S., Simkin, L. and Yuen, R. (1994) "Pan-European Advertising: Think Europe-Act Local", *International Journal of Advertising*, Vol. 13, N°2, pp. 125-136.

Dupagne, M. (1992) "EC Policy making: the case of the Television Without Frontiers Directive", *Gazette*, 48, pp. 99-120.

Heffler, M. (1996) "Moderates Wachstum und konsolidierte Marktanteile der klassischen Werbeträger", *MediaPerspektiven*, June, pp. 286-293.

Herdegen, M. (1995) "After the TV Judgement of the German Constitutional Court: Decision-making within the EU Council and the German *Länder*", *Common Market Law Review*, Vol. 32, pp. 1369-1384.

Hill, S. (1994) "Television Advertising in the UK: Market shares and Consumer Spending", *International Journal of Advertising*, Vol. 13, N°1, pp. 55-64.

Howard, T. (1998) "Survey of European advertising expenditure 1980-1996", *International Journal of Advertising*, Vol. 17, N°1, pp. 115-124.

Humphreys, P. (1992) "The European Community and Pan-European Broadcasting", *Journal of Area Studies*, Vol. 1, N°1, pp. 97-114.

Joppolo, D. (1996) "*Il mercato pubblicitario verso il 2000*", *Problemi dell'informazione*, 21st year, N°4, December, pp. 439-445.

Kabel, J. (1997) "Commercialisation of cinema films and TV films: some legal issues", *Communications Law*, Vol. 2, N°4, pp. 141-145.

Kraatz, K. (1992) "The New Broadcasting Regime for the New Federal States of the Federal Republic of Germany", *Entertainment Law Review*, Vol. 3, Issue 4, July-August, pp. 145-146.

Lidbetter, A. W. (1994) "The Advertising Standards Authority, the Committee of Advertising Practice and judicial review", *Media Law and Practice*, Vol. 15, N°4, pp. 113-116.

Logeais, E. (1993) "New Regulation of the French Advertising Market: Is Transparency to Follow Confusion?", *Entertainment Law Review*, Vol. 4, Issue 2, March-April, pp. 53-58.

Mattelart, A. and Palmer, M. (1991) "Advertising in Europe: promises, pressures and pitfalls", *Media, Culture and Society*, Vol. 13, No. 4, October, pp. 535-556.

Mele, M. (1996) "*Un quadro generale di risorse e di misure*", *Problemi dell'informazione*, 21st year, N°4, December, pp. 424-438.

Petty, R. D. (1996) "The Law of Misleading Advertising: An Examination of the Difference Between Common and Civil Law Countries", *International Journal of Advertising*, Vol. 15, pp. 33-47.

Pullen, M. (1996) "Television without Frontiers: Fact or fiction?", *Entertainment Law Review*, Vol. 7, Issue 5, July-August, pp. 175-177.

- (1996b) "TV Advertising within the EU and EEA", *Entertainment Law Review*, Vol. 7, Issue 1, January-February, pp. 35-39.

Pullen, M. and Ris, B. (1997) "Television Without Frontiers: The Saga Continues", *Entertainment Law Review*, Vol. 8, Issue 1, January-February, pp. 3-5.

Ridder, Ch.-M. (1995) "*Teleshopping-elektronisches Versandhaus oder Fernsehprogramm?*", *MediaPerspektiven*, September, pp. 414-427.

Robillard, S. (1995) "Status and responsibilities of European media regulatory bodies", *the BULLETIN*, European Institute for the Media, Vol. 3, pp. 5-9.

- (1995a) "Les autorités de régulation", *Media Pouvoirs, Dossier spécial 50 après*, Vols. 39-40, 108-119.

Sestrup, P. (1989) "Implications of current developments in West European broadcasting", *Media, Culture and Society*, Vol. 11, N°1, January, pp. 29-54.

Scorer, J. (1994) "Home Shopping Broadcasting: A storm in a shopping basket? Let the market decide", *Entertainment Law Review*, Vol. 5, Issue 6, November/December, 226-229.

Soria, C. and Azurmendi, A. (1994) "Le statut de la télévision en Espagne", *Légipresse*, N°114, September, pp. 45-47.

Voorhoof, D. (1993) "Restrictions on Television Advertising and Article 10 of the European Convention on Human Rights", *International Journal of Advertising*, Vol. 12, N°3, pp. 189-210.

Wenger, K. (1988) "European television-Pandora's box?", *EBU-Review, Programmes, Administration, Law*, Vol. XXXIX, N°5, September, pp. 26-31.

Wright, D. (1994) "Television advertising regulation and programme quality", *The Economic Record*, Vol. 70, N°211, December, 361-367.

6. 2. Articles in trade journals

Advertising Information Group (1997) "Alcohol Advertising", *AIG Notices*, April.

- (1997a) "Tobacco Advertising", *AIG Notices*, 4, 9 and 15 July.

Broadcast (1996) "RTL fined for breaking German rules on ads in films", *Broadcast*, 30 August 1996, 13.

Campaign (1997) "How virtual advertising works", 5 September, 47.

Commercial Communications (1996) "Virtual Billboards, EPSIS", *Commercial Communications*, Issue 4, September, pp. 10.

- (1997) "Commercial Communications to Children", *Commercial Communications*, Issue 7, June, pp. 11-15.

- (1997a) "The report of the Environment Committee", *Commercial Communications*, Issue 7, June, pp. 18-19.

- (1997b) "Comparative advertising and the consumer", *Commercial Communications*, Issue 8, August, pp. 13-15.

CSA (1991) “*La publicité audiovisuelle*”, *La Lettre du CSA*, N°26, Special Number, November.

- (1994) “*La réglementation du téléachat en France*”, *Lettre du CSA*, N°63, December, 9.

- (1995) “*Ethique et audiovisuel: régulation et autorégulation en Europe et en Amérique du Nord*”, *La Lettre du CSA*, N°67, April, pp. 11-15.

- (1995a) “*Audiovisuel et pouvoir exécutif en Europe de l’Ouest*”, *La Lettre du CSA*, N°70, July, pp. 1-4.

- (1996) “*L’activité du CSA en 1995*”, *La Lettre du CSA*, Special Number, September.

- (1997) “*Le sport à la télévision*”, *La Lettre du CSA*, N°89, February, pp. 4-11.

Degenhart, Ch. (1995) “*Rechtliche Aspekte des Teleshopping*”, *ZUM*, June, pp. 353-360.

Draughn, G. (1994) “*A Touch of Autodiscipline*”, *Ad-issues, The newsletter of the Advertising Association*, Issue 4, May, pp. 4-5.

epd medien (1997) “*SAT 1 dreimal wegen Schleiwerbung gerügt*”, *epd medien*, N°27, 12 April, 12.

epd/Kirche und Rundfunk (1995) “*NLM prüft Schleiwerbung für Versicherung in RTL-Serie*”, *epd/Kirche und Rundfunk*, N°5, 21 January, 19.

- (1996) “*Gericht-RTL betrieb Schleiwerbung in Kindersendung*”, *epd/Kirche und Rundfunk*, N°76, 28.

- (1996a) “*Rechtsaufsicht: „Schattenmann“ Sponsoring „noch“ im Rahmen*”, *epd/Kirche und Rundfunk*, N°30, 20 April, 22.

- (1996b) “*URL: SAT 1 hat gegen Sponsoringbestimmungen verstoßen*”, *epd/Kirche und Rundfunk*, N°78/79, 9 October, 18.

- (1996c) “*ARD siegt gegen ProSieben im Werbezeit-Streit*”, in *epd/Kirche und Rundfunk*, N°8012 October, 13.

European Broadcasting Union (1995) “*Television without Frontiers Directive*”, *Euro-Info, EBU newsletter*, Special issue, March.

Fröhlinger, M. (1996) “*The Green Paper, commercial communications in the Internal Market*”, *Commercial Communications*, Issue 4, September, pp. 15-24.

Geach, H. (1996) “*Sponsorship on Commercial Television: A European Perspective*”, *Commercial Communications*, September, Vol. 1, Issue 4, pp. 3-6.

Grégoire, M. (1996) "Sport events: Sponsorship, transmission rights and television broadcast sponsorship", *Commercial Communications*, September, Vol. 1, Issue 4, pp. 7-14.

Harrison, H. (1996) "The UK cable audience", *Admap*, July-August, pp. 36-38.

Hooper, R. (1996) "Cable: drivers, definitions, differences and dominance", *Admap*, July-August, pp. 27-30.

IRIS (1995) "France: TF 1 fined for failing to keep to standards laid down for sponsorship", *IRIS*, March, 9.

- (1995a) "Reference for a preliminary ruling of Court of Justice of the European Communities, OJ C 74 of 25 March 1995, 2-3", *IRIS*, May, 9.

- (1995b) "Provisional Decision 634/95 of the Regional Court of Bordeaux of 11 March 1995, *CIVB v TF1, France 2 and France 3*", *IRIS*, June, 12.

- (1995c) "The CSA circularises television programme producers on illegal indirect advertising", *IRIS*, October, 11.

- (1996) Ruling by the Munich Administrative Court on 15 November 1995, M3E96, 4829, in "Germany: Discussion on the authorisation of the first German teleshopping channel HOT", *IRIS*, January, 5.

- (1996a) "Decision of the Bavarian Constitutional Court of 22 December 1995", *IRIS*, February, 3.

- (1996b) "District Court of Hannover, Judgement of 22 August 1996, N° 265-441/95, *Ordnungswidrigkeitengesetz* (Regulatory Offences Act) 23, Js. 44458/95", *IRIS*, November, 11.

- (1997) "European Court of Justice Judgements on the interpretation of the "Television without Frontiers" Directive", *IRIS*, June, 4.

Jonas, K. and Levy, C. (1996) "Television Sponsorship in Europe", *Commercial Communications*, Issue 4, September, 11.

Kaz, B. (1996) "Researching the pan-European media market", *Admap*, July-August, pp. 31-32.

Kelly, S. (1995) "Is regulation hampering creativity?", *Admap*, November, pp. 26-28.

Marketing Week (1997) "French legal threat as drinks bodies fight Loi Evin sports ruling", *Marketing Week*, 12 June, 8.

McGarry, P. (1997) "European Court of Justice, consumer protection and television advertising", *Commercial Communications*, Issue 9, October, pp. 22-25.

Media International (1996) "Ad bans under attack from Brussels", *Media International*, September, 8.

Media Week (1995) "Scheduling for Sponsors", *Media Week*, 3 November, 12.

New Media Markets (1995) "Sat 1 faces fines for exceeding quotas", *New Media Markets*, 21 December, 11.

New Media Markets (1996) "RTL TV abandons bid to stop HOT broadcasting", *New Media Markets*, 11 January, 8.

- (1996b) "QVC to fall foul of new German carriage law", *New Media Markets*, 25 January, 14.

Roberts, B. (1996) "Will digital resolve Europe's great divide", *Admap*, July-August, pp. 33-35.

Simpson, P. (1994) "Oops, sorry about that", *Media Awareness Project*, March, 7.

Stanbrook, L. (1992) "EC advertising controls, the twilight zone", *Media Policy Review*, Issue 2, June, pp 4-5.

- (1997) "Children's advertising, consumer protection and the country of origin principle", *Commercial Communications*, Issue 9, October, pp. 18-21.

Veljanovski, C. and Fyfield, M. (1992) "Case study: The flawed economic rationale behind tobacco advertising bans", *Media Policy Review*, Issue 2, June, pp. 5-8.

Winnington-Ingram, R. (1996) "The UK television industry-1996 and beyond", *Admpap*, Vol. 31, N°2, Issue 359, February, pp. 36-38.

Woods, R. and Walker, J. (1994) "The future of advertising-media relations? in times of accelerating change", *Admap*, November, pp. 44-47.

ZUM (1994) "OVG, Rheinland-Pfalz of 18 February 199, Brutto-oder Nettoprinzip bei Unterbrecherwerbung im Fernsehen", *ZUM*, May, pp. 306-311.

- (1995) "Neuregelung des Sponsoring nach dem Ersten Rundfunkänderungsstaatsvertrag, Beschluß des OLG Frankfurt am Main of 27 April 1995, 6-U 8/98", *ZUM*, November, p. 800.

- (1997) "Brutto-oder Nettoprinzip bei Unterbrecherwerbung im Fernsehen: Urteil des Landgerichts Stuttgart of 10 October 1996", *ZUM*, January, pp. 62-67.

6. 3. Articles in newspapers

Handelsblatt (1997) "RTL Zuviel Werbung wird hart bestraft", *Handelsblatt*, 17 June, 1.

7. REPORTS, MIMEOS AND INTERNAL DOCUMENTS

Advertising Association, *Recent Developments, Alcohol Advertising, The Evin Law*, 23 February 1993, mimeo.

- *Executive Brief, Distance Selling*, London, 26 September 1996.
- *Executive Brief, Alcohol Advertising*, London, 12 November 1997.
- *Executive Brief, Tobacco Advertising*, London, 12 November 1997.

Association of Commercial Television in Europe, “*Synthèse des réglementations européennes en matière de publicité et parrainage*”, IMP ACT DATA, April 1994.

- Comments and position on the proposal for a revision of the “Television without Frontiers” Directive, Brussels, 17 February 1995, mimeo.

Asociación Española de Anunciantes, *Posición respecto a la técnica de emplazamiento de productos*, Madrid, 29 January 1996, mimeo.

Asociación de Usuarios de la Comunicación, *La publicidad en televisión, aspectos sociales y legislativos*, AUC, brochure, Madrid, 1995.

Michael Barrett (ed.), *Antenna'94, the broadcast sponsorship report*, Antenna Publications, London 1994.

- *Antenna'96, the television sponsorship report*, Antenna Publications, London, 1996.

Bufete Santiago Muñoz Machado, “*Código de comportamiento y de interpretación de las normas para la contratación y emisión de publicidad en televisión*”, Madrid, March, 1995, mimeo.

Carat Media, *Carat Media Focus*, Issue 4, London, September, 1994, mimeo.

Commission of the European Communities, “Policies, Public Health-Cancer, Advertising of tobacco products” in <http://europa.eu.int/comm/sg/scadplus/leg/en/cha/c11509.htm>, 14 January 1998.

CSA, *Réglementation et régulation audiovisuelles en Espagne*, Service des Publications du CSA, Paris, January, 1996.

CSA, *Réglementation et régulation audiovisuelles en France*, Service des Publications du CSA, January, 1996.

CTI Publications, *The Media Map 1996, European media markets and players*, London, 1996.

Department of Trade and Industry, “The Single Market: Making it work for you”, Brochure, September, 1994.

Enterprise et Prévention, *1991-1996 La Loi du 10 janvier 1991-Loi Evin: Bilan après cinq ans d'application*, Paris, 1996.

Euromonitor Plc., *European Data and Marketing Statistics*, London, 1998.

European Advertising Standards Alliance, "Advertisements in the Single European Market, How to make a Cross-Border Complaint", brochure, Brussels, 1996.

- *Update*, N°5, December, 1995.

- *Survey on National Regulatory Systems for Television*, study sponsored by ACT and EGTA, Brussels, February, 1995.

European Audiovisual Observatory, *Statistical Yearbook*, Strasbourg, 1996.

European Broadcasting Union, Statement on proposal for a revised Directive "Television without Frontiers", 29 March 1995; Complementary comments of the European Broadcasting Union on the Commission Proposal on the "Television without Frontiers" Directive, 12 June 1995, mimeo.

- EBU response to the Commission Green Paper on Commercial Communications in the Internal Market, 14 November 1996, mimeo.

European Commission, "The audio-visual policy in the Economic Community", *European Documents*, London, 1992.

- "The European Union", *European Documents*, London, 1994.

- "Adapting community legislation to subsidiarity", Background Report, ISEC/B3/94, London, 25 January 1994.

- European Commission, *Tobacco advertising*, Memo 95/159, 28 November 1995, London.

- "Commercial Communications", Background Report, ISEC/B14/96.

Financial Times, *The Future of the European Television Industry*, Dr Helen Bunting, Telecommunications and Media Publishing, London, 1996.

- *The Future of the UK Media Industry*, Dr Helen Bunting, Telecommunications and Media Publishing, London, 1996.

Fininvest S.p.A. and Mediaset S.p.A., Public Offer Document and Global Offer of Ordinary Shares, co-ordinated by Istituto Mobiliare Italiano and Morgan Stanley & Co. International, brochure, 10 June 1996.

Fundesco, *Comunicación Social: Tendencias 1993*, Madrid, 1994.

Gruppo Fininvest, *Un passo avanti due passi in dietro, perchè il NO ai referendum sulla legge Mammi*, brochure, 1995.

Health Education Authority, "Tobacco and the BBC: A review of how BBC TV promotes cigarettes through tobacco-sponsored sport", London, 1992.

"H.O.T., The mail order business firm of the future", Dr Georg Kofler, Managing Director, Pro7 Television and Chairman of HOT, on the occasion of the press conference on 26 April 1995 in the framework of the Munich advertising summit, mimeo.

IPA, "ITC Code of Programme Sponsorship, IPA response to the ITC Consultation of 20th July 1993, London, September, 1993, mimeo.

ITC, *Advertising and Sponsorship on Commercial Television*, brochure, 1996.

ITC *Annual Report and Accounts 1995*, London, presented to Parliament on 11 June 1996.

- *Annual Report and Accounts 1996*, London, presented to Parliament on 20 May 1997.

ITC News Release, "ITC issues formal warning to Granada Television", 21 November 1994.

- "ITC Publishes revised Code of Programme Sponsorship", 26 March 1997

- "ITC Amends Rules on Long Advertisements", 17 July 1996.

- "Teleshopping Windows and Self-Promotional Channels", 31 July 1997.

ITC Licensees' Sponsorship Group, "The ITC Licensees' Sponsorship Group Presentation for the ITC", London, November 1995.

Kagan World Media, Ltd., *Kagan's European Television Country Profiles*, March, London, 1996.

Letter from Martin Bangemann, EC Commissioner, to Emilio Colombo, Italian Foreign Affairs Minister, on the implementation of Directive 89/552/EEC of 3 October 1989, SG(92) D-15093, 92/2168, Brussels, 3 November 1992.

Letter from Emilio Colombo, Italian Foreign Affairs Minister, to Martin Bangemann, answering the precedent letter from Martin Bangemann Rome, no date.

Letter from Elena Salgado Méndez, then General Secretary of Communications, Ministry of Public Works, Transport and the Environment (now Ministry of *Fomento*), to Valerio Lazarov, then Director-General, Gestevisión Telecinco, Madrid, 24 November 1993.

Letter from Valerio Lazarov, then Director-General, Telecinco, to Elena Salgado, then General Secretary of Communications, Ministry of Public Works, Transport and the Environment (now Ministry of *Fomento*), Madrid, 25 November 1993.

Letter from Sinoué Wade, at the time Secretary General of ACT, to Gregory Paulger, DGX-C/1, on the proposed amendment of Council Directive 89/552/EEC, Brussels, 25 March 1995.

MediaGruppe München (MGM), "Media Vision '97", Presentation to international clients, London, Autumn, 1996.

- "The German Television Market", MGM presentation to international clients, London, November, 1996.

MediaGruppe München (MGM) and Droste Rechtsanwälte, *Deutsches TV-Werberecht, Die wichtigsten gesetzlichen Grundlagen für die Werbung im Privaten Fernsehen*, MGM, Munich, June, 1995.

MediaPerspektiven, *Basisdaten, Daten zur Mediensituation in Deutschland 1996*, Mainz, December, 1996.

Morgan Stanley International & Co., Investment Research UK and Europe, European Media, "France, Groupe AB", London, 31 January 1997.

- "German Digital Television: Dancing in the Dark", London, 7 November 1996.

- "European Advertising Review: First Quarter 1996", London, 19 June 1996.

- "France, EURO RSCG", London, 13 March 1996.

- "European Advertising Review: Back to reality", London, 12 February 1996.

Norcontel (Ireland) Ltd., *Economic Implications of New Communication Technologies on the audio-visual markets*, DGX/D/3, Directorate General for Information, Communication, Culture and Audio-visual, Working Document and Final Report, March-April, 1997.

NTC Publications, Ltd., *The European Advertising and Media Forecast*, Henley-on-Thames, UK, November, 1996.

- *World Advertising Trends*, Henley-on Thames, UK, 1996.

Oreja, M., Member of the Commission, "European trump cards in a game with global players: EU audio-visual policy", speech given at *Medientage*, Munich, 14 October 1997, in <http://www.europa.eu.int/en/comm/dg10/oreja/meditage.html>, 12 January 1998.

- "An evolving media landscape: Getting the most out of convergence and competition", speech given at the 9th European Television and Film Forum, European Institute for the Media, Lisbon, 7 November 1997, in http://www.europa.eu.int/en/comm/dg10/avpolicy/key_doc/orejcome.html, 12 January 1998.

Pro7 Media AG, *Zur Regelung zeitlicher Mindestabstände zwischen Unterbrecherwerbeblöcken*, memorandum, Munich, June, 1997, mimeo.

Publiespaña, *Los diversos fenómenos de comunicación comercial*", internal explanatory brochure on other forms of advertising, Madrid, 1995.

Publitalia'80, "*La questione delle telepromozioni*", Internal Marketing Presentation, N°4449, Milano, 1993.

- "*L'interpretazione autentica della CEE*", Internal Marketing Presentation, N°4540, Milano, 1993.

- “*Le tre fasi della vicenda telepromozioni*”, Internal Marketing Presentation, N°4635, Milano, 1993.

- “*Aggiornamento Telepromozioni*”, Internal Marketing Presentation, N°4731, Milano, 1993.

- “*Il parere motivato inviato dalla Commissione della CEE alla Repubblica Italiana il 6 Aprile 1994*”, Internal Marketing Presentation, N°5230, Milano, 1994.

- “*New Forms of Advertising According to Council Directive 552/89*”, brochure, Milano, 1994.

Roberts, J. L. (1987) “*Monitoring Tobacco-Sponsored Snooker on BBC TV 1985-86*, Report from the North Western Regional Health Authority for the Health Education Council, UK.

Stanbrook, L. (1992) “*Advertising in the new Europe*”, *Briefings on advertising*, The Advertising Association, UK, mimeo.

TBI (Television Business International), *Yearbooks 1994, 1995, 1996*, Twenty-first century Business Publications Ltd, London.

TF1, *Transposition de la Directive Télévision sans Frontières dans les principaux pays européens*, internal report by SMC Martin, under the supervision of D. Angelo, Paris, February 1996.

TF1, *Code d'utilisation du décret sur le parrainage*, internal brochure, Paris, 1996.

ZDF, *ZDF Schriftenreihe, Werbung im öffentlich-rechtlichen Rundfunk*, N°51, Mainz, July 1994.

Zenith Media, *Television in Europe to 2005*, December 1995.

8. WORLD WIDE WEB

<http://www.adassoc.org.uk/>, April 1997

<http://www.europa.eu.int/>, October 1997 to January 1998

<http://www.publitalia.it/>, December 1997.

<http://www.aig.org/aig/notices>, November 1997.

APPENDIX 1

EXCHANGE RATES

Annual average
Source: Bank of England

<u>Currency</u>	<u>1994</u>	<u>1995</u>	<u>1996</u>
ECU/£	1.2924	1.2211	1.2467
FF/£	8.4852	7.8730	7.9890
DM/£	2.4811	2.2605	2.3501
Lit/£	2467.3514	2570.7495	2408.1999
Pta/£	204.3257	196.7146	197.8231
US\$/£	1.5329	1.5783	1.5617
ECU/US\$	0.8440	0.7739	0.7983